No. 498.
Brf. & Ess for P. E.
Filed Feb. 14, 1901.

Office Supreme Court U.S.
FILED
FEB 14 1901
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH, ET AL., PLAINTIFFS IN ERROR,

vs.

THE BARBER ASPHALT PAVING COMPANY, DEFENDANT IN ERROR.

STATEMENT AND BRIEF FOR THE PLAINTIFFS IN ERROR, BY

HENRY N. ESS,
Their Counsel.

THE SENTINEL PRINT, INDEPENDENCE, MO.

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STATEMENT AND BRIEF FOR THE PLAINTIFFS IN ERROR.

This suit was begun in the Jackson Circuit Court, in Jackson County, Missouri, by The Barber Asphalt Paving Company against Margaret French, Henry French, Oliver H. Dean (trustee for William D. McCleod), and William D. McCleod, defendants. The petition states that the plaintiff is a corporation duly organized according to law and permitted to do business in Missouri under her laws; that Kansas City is a municipal corporation under the laws of Missouri, and as such corporation it passed an ordinance numbered 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth (12th) street," and thereby provided for paving that street; that the board of public works awarded the contract to the plaintiff; that the contract was confirmed by the common council, and that the work has been completed and accepted by the city; that after the work was completed the board of public works computed the cost thereof and assessed and apportioned such cost as a special tax against the land chargeable therewith, as provided by law, and as provided in Article IX of the city

charter of Kansas City, adopted April 8th, 1889; that thereafter the city issued to the plaintiff a certain tax-bill, payable in four equal installments, in part payment for the cost of the work. The tax-bill is copied in the petition. This tax-bill, as copied, states that lot 12 in block "H" in Ranson & Tally's addition to Kansas City has been charged with the sum of $302.52 cents as a special tax for paving Forest avenue from Independence avenue to Twelfth street, pursuant to the ordinance number 5891; that the work has been completed according to contract by The Barber Asphalt Paving Company, contractor, to whom this tax-bill is issued in part payment for the work, and the sum mentioned has been duly assessed and apportioned against this lot, being the exact amount chargeable against said lot, as provided by law, for its proportion of the cost of said work, and it is a lien against the lot for a year after the last installment becomes due and until foreclosed in court. The tax-bill says it is given by the board of public works of Kansas City, Missouri. The petition then states that the plaintiff receipted to the board of public works for the tax bills, and that one installment is due; that the defendants own the lot. Plaintiff asks judgment for $75.63 for the fourth installment and 10 per cent interest and costs to be levied of this lot only.

There were three other counts in the petition, all like the first. The answer stated several defenses. One that the ordinance was not authorized by the charter; one that the contract was not authorized by the charter. Only one count in the answer need be noticed here. That is the first count. It states that the Defendant Margaret French is the owner in fee and in possession of the lot; that plaintiff paved the street under contract with Kansas City; that on completion of the work the board of public works computed the cost thereof under the contract between the contractor and the city and apportioned the cost thereof according to the frontage on all lots on Forest avenue from Independence avenue to Twelfth street, and charged against this lot its proper proportion according to its frontage on the street. The total cost of the work was $28,339.54 and the total frontage was 4,683.95 feet. (Printed record 9). There was a special contract in writing, and by it Kansas City was not to be liable for the cost of the work or in any way except by issue

of tax-bills against the abutting property; that the tax-bills were to be made according to the frontage of the property on the street; that there was no authority for this contract except an ordinance of the city; that an ordinance was passed to pave the street and pay for it in special tax-bills against the abutting property according to the frontage on the street. There was no law authorizing the tax-bill or the contract or the ordinance except Article IX of the city charter and Section 5 thereof. That by this law all lots are charged with the cost of the work according to their frontage on the street without reference to benefits; that this law is contrary to the Constitution of the United States and the fourteenth amendment, and is void; that by this state law, defendants are deprived of their property without due process of law, and that the city charter, the ordinance, the contract, the tax-bills, are all void, as being without authority of law. The Kansas City charter, being unconstitutional, is no authority for any of the proceedings. Judgment is asked for defendants. A like answer was made to each of the other counts in the petition. Plaintiff filed a reply stating that the several lots and this one were benefited to an extent exceeding the cost thereof, and exceeding the amount of the tax-bill. The Missouri law does not allow any further pleading after a reply. At the trial it was admitted that the plaintiff had complied with the Missouri law as to doing business in Missouri; that John Maloney was authorized to sign the tax-bills.

The tax-bills were offered in evidence. The defendants objected to the tax-bills being read in evidence on the grounds that there was no authority of law for them; they are void on their face. It appears that they are void because the charter authorizing them is in conflict with the Constitution of the United States and void. The objection was overruled and defendants excepted and the tax-bills were read in evidence. Then the plaintiff introduced as a witness W. S. Woods. His testimony was to the effect that the property on the street was benefited to an extent exceeding the cost of the work. This testimony was objected to on the ground that it was irrelevant, incompetent and immaterial. This objection was overruled and excepted to. (The Supreme Court of Missouri, in

passing on this point, say this was error, but not reversible error. See printed record, p. 49, top).

The plaintiff here rested.

Defendants offered and read in evidence the ordinance of Kansas City for doing this work. (Printed record, pp. 25-26).

This ordinance provides for paving the street with asphalt. "The work shall be paid for in special tax-bills against and upon the lands that may be charged with the cost thereof, according to law."

"And the passage of this ordinance and the doing of said work shall not render Kansas City liable to pay for said work, or any part thereof, otherwise than by the issue of special tax-bills."

The cost of the work shall not exceed $2.57 per square yard. The tax-bills to be issued in installments, payable in one, two, three and four years. (Printed record, p. 26).

Defendants offered and read in evidence the contract for doing this paving. This contract is in printed record, pp. 27 to 32.

This contract recites that The Barber Asphalt Paving Company is the lowest and best bidder for paving Forest avenue, and the company agrees to pave the street.

The contract has this clause—(printed record, p. 31, three lines below "general stipulations:"—

"10. It is further agreed that the passage of the ordinance referred to and the doing of the work shall not render Kansas City liable to pay for the work otherwise than by the issue of special tax-bills." "And the said first party shall assume all risks as to the validity of such special tax-bills and take the same without recourse against Kansas City in any event."

He is to do the work at $2.57 per square yard, payable in special tax-bills, "And that his receipt therefor shall be in full of all claims against Kansas City on account of the work."

This was all the evidence.

Thereupon defendants asked the court to give cer-

tain instructions or declarations of law. Under Missouri law, in a suit at law plaintiff or defendant may ask declarations of law or instructions equivalent to a charge to a jury, and either party can predicate error on giving or refusing such declarations of law.

Defendants asked the following instructions:

1. Under the pleadings and evidence plaintiff cannot recover.

2. The ordinance No. 5891, entitled "An ordinance to pave Forest avenue from Independence avenue to Twelfth street," approved July 17th, 1894, is contrary to and against the charter of Kansas City, and is therefore null and void, and the finding and verdict must be for the defendants.

3. The contract offered in evidence for paving Forest avenue is invalid and void and without any authority in Kansas City and her mayor and common council to make the same.

4. The contract offered in evidence and read in evidence is a contract to construct the pavement and maintain and keep the street in repair for five years, and is contrary to the charter of Kansas City, and is forbidden by it and is void and of no effect, and your verdict and finding must be for the defendants.

5. The tax-bills sued on are without any authority of any law of this state, or of the United States, and are therefore null and void.

6. The charter of Kansas City purports to authorize the paving of streets and to authorize the special tax-bills, charging the entire cost thereof on the abutting property, according to the frontage, without reference to any benefits to the property on which the charge is made and the special tax levied, and said charter purports to authorize the levying of the special tax notwithstanding the fact that the work for which it is done is a damage to the property and destroys its value. That law is contrary to and in violation of the fourteenth amendment to the Constitution of the United States.

The plaintiff objected to the court giving these in-

structions, or any of them. The court sustained the objection and refused to give the instructions, or any of them, and defendants then and there excepted.

The case was then submitted to the court and judgment was rendered against defendants, and defendants filed their motion for a new trial on these grounds:

1. The verdict is against the law.

2. The judgment is against the evidence.

3. The judgment is against the law and the evidence.

4. The court erred in excluding legal and competent and relevant evidence offered by defendants.

5. The court erred in admitting incompetent, irrelevant and illegal evidence on behalf of plaintiff against the objections of defendants.

6. The court erred in refusing to give each and every one of the instructions asked by the defendants.

7. The judgment is otherwise erroneous, illegal, defective and contrary to law.

8. The court erred in not rendering judgment in favor of the defendants and against the plaintiff.

The court overruled this motion and defendants excepted. A bill containing all these exceptions was duly filed.

Within due time defendants filed their motion in arrest. The motion in arrest was on these grounds:

1. The judgment upon the record is erroneous.

2. The judgment is in favor of the plaintiff, whereas, under the pleadings and the evidence, it should be for the defendants.

3. The plaintiff's petition does not state facts sufficient to constitute a cause of action against the defendants.

4. The judgment is otherwise erroneous, illegal, defective and contrary to law.

The court overruled this motion, and thereupon defendants took the case to the Supreme Court of Missouri by appeal.

The defendants brought before the lower court the

unconstitutionality of the Kansas City charter in various ways.

FIRST.

It was specially set up in the answer.

SECOND.

We objected to any evidence being offered at the trial. The charter is a public law of the State of Missouri. The petition says the tax-bill is founded on Article IX. This levies the tax according to frontage, without reference to benefits.

THIRD.

We asked several instructions on this point. There can be no recovery under the evidence. We asked a direct instruction that this charter is contrary to the fourteenth amendment.

FOURTH.

In the motion for a new trial we called attention to these errors in the Jackson Circuit Court. We exhausted every effort in that court.

In the Supreme Court of Missouri we set up and assigned the same matters as errors. The leading point in the case as argued and decided was the constitutional validity of the Kansas City charter as to the National Constitution. That appears in the opinion of the court in the printed record, pp. 36 to 49.

The case is here on writ of error to the Supreme Court of Missouri, under Section 709 Revised Statutes of the United States, on the ground that in this case there is drawn in question the validity of a statute of the State of Missouri on the ground of its being repugnant to the Constitution of the United States and the decision of the Supreme Court of Missouri was in favor of the validity of the state law, the Kansas City charter.

The Missouri Constitution shows that the Supreme Court of Missouri is the highest court in the state in which the case could be decided. Article VI in Constitution of Missouri, in Revised Statutes of Missouri for 1899, Vol. 1, in front part of the book, page 86, et seq.

Article IX of the city charter is found in a book published as a law book entitled "Charter and Revised Ordinances, annotated, Kansas City, Missouri, 1898." We copy the Article IX entire except sections having no reference to the matter under consideration.

SECTION 1. (This section refers to width of sidewalks. It is left out).

SECTION 2. *Streets and Sidewalks—Paving—Construction and Repairing—Payment in Special Tax Bills—Board of Public Works—Recommendation by to Pave—Remonstrance—Selection of Material.*—The city shall have power to cause to be graded, regraded, constructed, reconstructed, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized, remacadamized, curbed, recurbed, guttered, reguttered or otherwise improved or repaired, all streets, alleys, sidewalks, avenues, public highways and parts thereof and to construct and reconstruct sidewalks and to sod and plant trees along the side or sides thereof, to be paid for in like manner as such sidewalks are paid for, or as part of the costs and expenses of the construction or reconstruction of such sidewalks, within the city at such times and to such extent, of such dimensions and with such materials and in such manner and under such regulation as may be provided by ordinance and to pay therefor out of the general fund or by issuing special tax-bills as herein mentioned; *provided*, that whenever the common council shall deem it necessary to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, within the limits of the city, and payment for such work and improvement is to be made in special tax-bills, the common council shall, by resolution, declare such work or improvement to be necessary, stating the kind of paving material proposed to be used, and such resolution, or the substance thereof, shall be published for ten days (Sundays included) in the newspaper doing the city printing, and unless the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved, shall, within thirty days from the first day of such publication, file with the city clerk a remonstrance, signed by them, against the proposed improvement, then the common

council shall have power to cause the proposed improvement to be made and to issue special tax-bills therefor, as herein mentioned; *provided*, however, that no such resolution or ordinance shall be passed by the common council except upon recommendation of the board of public works indorsed thereon; and *provided* further, that if the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, alley, avenue, public highway or part thereof to be improved shall, within thirty days after the first day of the publication of such resolution, file with the board of public works a petition, signed by them, to have such street, alley, avenue, public highway, or part thereof, paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized with a different kind of material or in a different manner from that specified in such resolution, then the ordinance providing for the doing of such work or making such improvement shall provide that the work shall be done in the manner and with the material specified in such petition, and in such case the ordinance need not be recommended by the board of public works as aforesaid. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk, as herein provided, then the power of the common council to make the proposed improvement and pay therefor in special tax-bills, shall cease until a sufficient number of the persons so remonstrating or their grantees shall, in writing, withdraw their names, or the property represented by them from such remonstrance so that said remonstrance shall cease to represent a majority of the resident property owners as above provided, when the common council shall proceed in the manner above mentioned to cause the proposed improvement to be made; *provided* further, however, that if the board of public works shall unanimously recommend to the common council that any business street, alley, avenue, public highway or part thereof, be paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized, and the payment therefor is to be made in special tax-bills, and the common council shall, by ordinance, order such work to be done by a vote of two-thirds of the members-elect of each house of the common council, then such work may be done without any resolution, as hereinbefore provided, and regardless of such remonstrance. When

the work shall be so recommended by the board of public works and so ordered by the common council as last above mentioned, the resident owners of the city who own a majority in front feet of the lands belonging to such residents and fronting on such street, avenue, alley, public highway or part thereof to be improved, shall have the right to select the material with which such street, alley, avenue, public highway or part thereof shall be paved, repaved, blocked, reblocked, graveled, regraveled, macadamized or remacadamized from not less than two kinds of materials, to be designated by the board of public works, such selection to be made by them within ten days after such ordinance shall have taken effect and been published for ten days in the newspaper at the time doing the city printing, which selection shall be by petition in writing, addressed and delivered to the board of public works. If such selection be not made within such time, then the board of public works shall designate the material with which such street, alley, avenue, public highway or part thereof shall be improved.

SEC. 3. *Payment for Improving Streets—Ordinances and Contracts to Specify How to be Made.*—All ordinances and contracts for all work authorized to be done by section two of this article shall specify how the same is to be paid for, and in case payment is to be made in special tax-bills, the city shall in no event nor in any manner whatever be liable for or on account of the work.

SEC. 4. *Resolution—Remonstrance—Recitals in Ordinance—Business Streets—Objections to Tax Bills.*—When it shall be proposed to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof and pay therefor in special tax-bills, if the common council shall, by ordinance, find and declare that the resolution provided in section two of this article has been published as therein required and that the resident owners of the city who own a majority in front feet of all the lands belonging to such residents fronting on the street, alley, avenue, public highway or part thereof to be improved have not filed with the city clerk a remonstrance against the doing of such work or a petition for the making of such improvement with a different kind of material or in a different manner from that specified in such resolution, or that such petition was filed

for the doing of the work as mentioned in said ordinance, such finding and declaration shall be conclusive for all purposes, and no special tax-bill shall be held invalid or affected for the reason that such resolution was not published as therein required, or that a remonstrance or petition sufficiently signed was filed as therein required, or that such petition was not filed or was insufficiently signed. When the city shall propose to pave, repave, block, reblock, gravel, regravel, macadamize or remacadamize any street, alley, avenue, public highway or part thereof, without resolution of the common council declaring such improvement to be necessary, but upon the unanimous recommendation of the board of public works, if each house of the common council shall, by ordinance, find and declare by a vote of two-thirds of the members-elect of each house that the street, alley, avenue, public highway or part thereof, on which the proposed improvement is to be made, is used or occupied for business purposes, and that the improvement has been unanimously recommended by the board of public works, such finding and declaration shall be conclusive for all purposes, and no special tax-bill that may be issued to pay for the work shall be held invalid or affected for the reason that the work for which they have been issued was not unanimously recommended by the board of public works, or that such street, alley, avenue, public highway or part thereof was not, in fact, used or occupied for business purposes.

SEC. 5. *Payment in Special Tax Bills—Assessment District—Improvements Excluded—Lots and Blocks—Question as to Determined by Common Council—Sidewalks, Curbing and Guttering—Cost of Work on How Paid—Work Done at Street Intersection—Cost of How Charged.*—The cost of all work mentioned in the preceding sections of this article shall, when the same is to be paid for in special tax-bills, be apportioned and paid as follows, viz: the cost of all grading, including the grading of sidewalks, shall be charged as a special tax on all lands on both sides of the street, avenue, or public highway, or part thereof, graded, within the following limits, viz: in case any of the land fronting on the street, avenue, or public highway, or part thereof, graded, be laid off in lots or blocks, property so laid off, from the line of the street, avenue or public highway, back to the center

line of the block or blocks, shall be so charged, whether fronting on the street, avenue, or public highway, or not; nevertheless the common council shall have power by ordinance to prescribe that such land shall not be charged beyond the alleys in such blocks, if deemed just and equitable; and in case any land fronting on such street, avenue or public highway, or part thereof, graded, be not laid off into lots, and blocks, then the land so not laid off, and the land in the rear thereof on the line of the street, avenue, public highway, or part thereof, graded, back one hundred and fifty feet, *shall be so charged, whether fronting on the street or not;* and lands liable for such grading shall be charged according *to the value thereof, exclusive of improvements thereon, as provided in the next succeeding section,* and in cases of question on the part of the assessor or the board of public works as to whether any lands fronting on the street, avenue or public highway, or part thereof, be laid off into lots or blocks or not, within the meaning of this section, the common council shall, on the request of the assessor or board of public works, in making out special tax-bills and charging the land for such grading, determine whether or not any particular land or lands fronting on the street, avenue, public highway, or part thereof, graded be laid off or not into lots and blocks within the meaning of this section, and such determination shall be conclusive on all parties interested for all purposes. The cost of all work on any sidewalk, including curbing and guttering along the side thereof, exclusive of the grading of the same, shall be charged as a special tax upon the adjoining lands according to the frontage thereof on the sidewalk. The cost of all other work specified in the first three sections of this article on all streets, avenues, alleys and public highways, or parts thereof, shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley or public highway, or parts thereof, improved, *according to the frontage thereof.* The cost of all work mentioned in the first three sections of this article done on spaces fronting on any other street, avenue, alley or public highway, shall be deemed part of the costs of work done on other spaces under the same ordinance and contract, and be charged and paid for accordingly.

SEC. 6. *Grading—Assessment to Pay for—Duty of Assessor—Cost of Other Work—Engineer to Compute and Apportion—Special Tax Bills.*—After a contract shall have been made for the grading or regrading of any street, sidewalk, avenue, or public highway or part thereof, the city assessor shall, on demand of the board of public works, if the work is to be paid for in special tax-bills, cause an assessment to be made of the value of all the lands to be charged with the cost of such grading or regrading, exclusive of improvements thereon, and shall deliver such assessment to the board of public works to compute the costs thereof, and apportion such cost among the several lots or parcels of land to be charged according to the values thereof fixed by the city assessor, as aforesaid, and charge each lot or parcel of land with its proper share of such cost. When any work other than grading or regrading, as last aforesaid, shall be completed, and is to be paid for in special tax-bills, the board of public works shall cause the city engineer to compute the cost thereof, and apportion the same among the several lots or parcels of land to be charged therewith, and charge each lot or parcel of land with its proper share of such cost according to the frontage of such land. The board of public works shall, after the cost of any work has been so apportioned for payment in special tax-bills, except as hereinafter provided, make out and certify in favor of the contractor or contractors to be paid, a special tax-bill for the amount of the special tax, according to such apportionment against each lot or parcel of land to be charged.

SEC. 7. (This is for repairing sidewalks, curbs, and is omitted. Sections 8, 9, 10, 11, 12, pertain to sewers and are omitted. Sections 13, 14, 15, 16 and 17 are omitted. They contain nothing pertaining to the subject matter in hand).

SEC. 18. *Tax Bills—Payment—Cancellation—Lien—Suit on—Jurisdiction of Court—Evidence—Defenses—Interest—Assignable—Execution—Sale by Sheriff—Certificate of Purchase—Redemption—Deed—Contribution When Owner of Undivided Interest in Land Compelled to Pay Whole Tax Bill.*—Every special tax-bill may be paid to the owner or holder thereof and upon presentation of such tax-bill, marked paid, to the city treasurer he shall cancel and mark paid the amount of such tax-bill on the record thereof, which entry, when made,

shall have the same effect to discharge the lot or parcel of land affected by such tax-bill from the lien thereof, as if the amount of such tax-bill had been paid to the city treasurer as in the preceding section provided, and such entry shall be evidence of payment of the tax-bill as therein stated. Every special tax-bill issued under the provisions of this article shall be a lien upon the land described therein, upon the date of the receipt to the board of public works therefor, and such lien shall continue for two years thereafter, but no longer, except as in this article otherwise provided, unless suit shall be brought to collect the same within two years from the issue thereof, in which case the lien shall continue until the determination of the legal proceedings to collect the same, including any sale of the property charged; *provided*, however, that if such suit shall be brought within the two years the plaintiff or plaintiffs therein shall at the time, or within ten days after the commencement of suit, and not later than thirty days after the end of the two years, in person or by attorney or agent, file in the office of the city treasurer, a written statement showing the tax-bills sued on, and when and in what court, and against whom the said suit has been brought. The city treasurer shall, immediately after the filing of any such statement, note on the record of such tax-bill the time of filing of such statement and the substance of the same. If the plaintiff or plaintiffs in such suit shall fail to file such statement within the time above limited the land described in the tax-bill sued on shall be free from the lien of the tax-bill and of any judgment in such suit, no matter when rendered, and shall not be sold in satisfaction of any such judgment. Every special tax-bill, if paid within thirty days from the date of issue, shall bear no interest, if not paid within such time shall bear interest from the date of issue at the rate of ten per cent per annum, except as herein otherwise provided. No such tax-bills need give the name of any party owning or interested in the land charged and bound by the lien, and before the suit the owner of any part in severalty or of any undivided interest in any land charged by any tax-bill may pay his share separately, in which case his part or interest shall not be further liable in case of suit. Such tax-bill shall be issued within twenty days from the completion and acceptance of the work, but the failure to issue them within such

time shall not affect the validity of the tax-bills. All or any of the owners of the land charged, or of any interest or estate therein, may be made defendants in any suit, but only the right, title, interest and estate of the parties made defendants in any such suit shall be affected or bound thereby, or by the proceedings therein. In case any owner of the land or interest therein shall be unknown, or a non-resident of the State, suit may be brought against such owner separately or together with others, and such unknown or non-resident owner may be proceeded against and charged by giving notice, either by publication in a newspaper or otherwise, as in a suit in the circuit court of Jackson county, to enforce any other lien on land in the county. Every such special tax-bill and the lien thereon shall be assignable and any assignee may sue in his own name. It shall be sufficient for the plaintiff in any suit to plead the making and issuance of the tax-bill sued on, giving the date and contents thereof, and the assignment thereof, if any, and to alledge that the party or parties made defendants own or claim to own the land charged, or some estate or interest therein, as the case may be, and to file the tax-bill in the suit. Special tax-bills against different lots or parcels of land, owned by the same party or parties made defendents, may be joined in one suit, but a separate judgment on each tax-bill shall be rendered and execution shall be issued accordingly. Every tax-bill shall, in any suit thereon, be *prima facie* evidence of the validity of the bill, of the doing of the work and of the furnishing of the material charged for and of the liability of the land to the charges stated in the bill; *provided* that nothing in this section shall be so construed as to prevent any defendant from pleading and proving in reduction of any bill, any mistake or error in the amount thereof, or that the work therein mentioned was not done in a good and workmanlike manner; and *provided* further, that if any party shall plead any mistake or error in the amount of the bill, or that the work was not done in a workmanlike manner, and that such party before the commencement of the suit tendered to the contractor or holder of the bill the full value of the work done and shall establish the same on trial, the recovery shall only be for the amount so tendered and judgment for costs shall be rendered against the plaintiff; and provided further, if it shall be pleaded and proved that the work for which the bill was

issued was not done according to the terms of the contract made by the contractor with the city, then the plaintiff or plaintiffs shall recover thereon only the actual value of the work done, if of any value, and if not of any value, the judgment shall be for the defendant. No suit on any tax-bill shall be defeated or affected by any irregularity affecting any other bill, or matter rendering any other bill invalid in whole or in part. In a suit on any special tax-bill the judgment shall be special that the plaintiff shall recover the amount found due including interest, together with costs, to be levied and made off the land described in the tax-bill, and a special execution shall issue to sell the land to pay any such judgment, interest and costs. The judgment, exclusive of costs, shall bear interest at the same rate as the tax-bill. Suits on special tax-bills issued under this article may be brought in any court of competent jurisdiction. When the amount due on any tax-bill shall not exceed $300, suit may be brought thereon in the Circuit Court of said Jackson county or before any justice of the peace of the city or of Kaw township in said county, but to enforce any judgment rendered by any justice of the peace a transcript of the judgment shall be filed in the office of the clerk of the Circuit Court of Jackson county, at said city, and duly docketed, recorded and indexed as a judgment of that court; whereupon a special execution may be issued out of that court the same as if the judgment had been rendered in that court. Upon sales made by the sheriff under any such special execution, he shall issue to the purchaser a certificate of purchase, setting forth the substance of such special execution, the date of sale, the purchaser, the property sold, and the amount bid. If the property so sold be redeemed within one year from the date of such sale by payment to the sheriff of the amount due on said judgment, including interest and costs up to the date of redemption by the owner of or party interested in the said property, no deed shall be given by the sheriff. Upon such redemption as herein provided of any lot or parcel of land sold under such special execution the judgment against the same and the lien thereon shall be satisfied on the record of such judgment in the office of the clerk of the Circuit Court aforesaid by said clerk upon presentation of the receipt of the sheriff for the amount necessary for redemption. If the lot or parcel of

land so sold be not redeemed, as herein provided, a deed shall be given at the end of one year from the date of said sale by the sheriff to the holder of said certificate. Such deed may be given to the original holder of such certificate or his assignee and shall vest all the right, title, interest and estate in the land so sold that defendants and each of them owned at the time that the lien of the tax-bill commenced, or acquired afterward, and every such special judgment, as herein provided, shall bind all the right, title, interest and estate in the land that defendants and each of them owned at the time that the lien of the tax-bill commenced or acquired afterward. Proceedings on special executions on judgment on special tax bills shall, except as herein provided, including the making of deeds to purchasers, conform as far as practicable to proceedings on other special executions from the Circuit Court. Such certificate of purchase shall be delivered by the sheriff to the purchaser, or his assignee, on payment of the amount bid, which certificate shall be executed and acknowledged by such sheriff before an officer authorized to take acknowledgments of instruments affecting real estate, and shall be filed for record in the office of the recorder of deeds of Jackson county, at Kansas City, within six months after the date of same. Parties interested in the land not made defendant shall not be affected thereby, and if they claim, through or under any party defendant, by right acquired before such suit was brought, may redeem from the purchaser or otherwise assert their rights according to equity and good conscience. In case the owner of any undivided interest or particular estate in any land charged be compelled by suit to pay on account of any such tax-bill more than he ought equitably to pay, as between him and others interested in the land, such owner so paying shall be subrogated to the lien of such tax-bill, and may, by proper proceedings in any court of competent jurisdiction, enforce such lien and have the equities between such owners so paying and other parties interested in the land adjusted, though such other parties were not parties defendant to the original suits in the tax-bill, and though such subsequent proceedings may be commenced after two years from the issue of the tax-bill, and the lien of the tax-bill shall continue after the two years for the purpose of such remedy, or

the owner so paying shall be entitled to contribution from others according to equity without enforcing the lien.

Sections 19 and 20 have no reference to the matter under consideration, and are omitted.

SEC. 21. *Street—Cleaning, Sprinkling and Maintaining—Contracting and Paying For.*—The city may cause the driveway portions of any street, avenue, public highway or part thereof, to be cleaned, sprinkled and maintained and kept in repair, or to be cleaned, or to be sprinkled, or to be maintained and kept in repair, and may contract therefor in such manner as may be provided by ordinance for a period of time not to exceed two years, and pay therefor out of the general fund, or by issuing special tax-bills as herein mentioned; *provided*, that when the common council shall deem it necessary that a contract be made for doing any of the work above mentioned, payment for which is to be made in special tax-bills, it shall, by resolution, declare such work or improvement to be necessary, stating the kind of work or improvement to be done, and the street, avenue, or part thereof, on which it is proposed to have such work done and the length of time for which a contract is to be let therefor, and such resolution or the substance thereof, shall be published for ten days in the newspaper doing the city printing, and unless the resident owners of the city who own a majority in front feet of all the lands belonging to such residents and fronting on the street, avenue or public highway, or part thereof on which such work is to be done, shall, within thirty days after the first day of such publication, file with the city clerk a remonstrance signed by them against the proposed improvement, then the common council shall have the power to cause the proposed work or improvement to be made and to contract therefor as herein provided and to issue tax-bills to pay therefor as herein mentioned; *provided* further, however, that no such resolution or ordinance shall be passed by the common council except upon the recommendation of the board of public works endorsed thereon. If the remonstrance of the resident property owners above mentioned shall be filed with the city clerk as herein provided, then the power of the common council to cause the proposed work to be done shall cease until a sufficient number of the persons so remonstrating or their grantees shall, in writing, withdraw

their names or the property represented by them from such remonstrance, so that said remonstrance shall cease to represent a majority of the resident owners as above provided, when the common council may again proceed in the manner above mentioned. When the city shall have entered into a contract for the doing of any of the work in this section mentioned, and payment therefor is to be made in special tax-bills, the cost thereof shall be apportioned according to the frontage of the property on the street or avenue or part thereof named in the contract for doing the work, and tax-bills shall be issued against each tract or parcel of land for its proportionate cost, which tax-bills shall be issued at such intervals of time during the continuance of such contract as payment in full for all work done under the contract to the date of issue of such tax-bills, and shall be payable in such a period of time from the date of issue thereof, and shall bear such rate of interest as may be provided in the ordinance for the doing of such work. Such tax-bills shall be a lien on the property against which they are issued, and the provisions relating to special tax-bills which may be issued pursuant to authority given in this article, except the section relating to the issuing of tax-bills payable in installments, shall, so far as applicable, and not in conflict with the provision herein contained, apply to tax-bills issued under this section.

SEC. 22. *Petitions and Remonstrances to be Canvassed—Certificate as to.*—Whenever petitions for or remonstrances against public improvements are required by this charter to be signed by resident property owners the board of public works shall canvass the same and ascertain whether the signatures thereon represent a majority of front feet owned by resident owners of the property to be improved and certify the result of such canvass to the common council, and such certificate shall be *prima facie* evidence of the facts therein stated.

SEC. 23. *Streets—Paving and Other Improvements—Payment for in Installments—Interest—Suits to Collect—Objections to Tax Bills to be Filed—Lien and Assignment of Tax Bills—Other Provisions Concerning.*—The common council may by ordinance provide that special tax-bills issued for the grading, regrading, paving, repaving, construction, reconstruction, blocking, reblocking, graveling, regraveling, macadamiz-

ing, remacadamizing, curbing, recurbing, guttering, reguttering, or the construction or reconstruction of sidewalks, including sodding and planting of trees, or other improvements of any street, alley, sidewalk, avenue, public highway or part thereof, or the construction of sewers, shall be made payable in four equal installments, and such tax-bills when issued shall be payable and collectible as follows: The first installment shall become due and collectible on the 31st day of May next succeeding the date of issue of the tax-bills, *provided*, that if such period is less than thirty days after the issue of the tax-bills, then the first installment shall become due and collectible on the 31st day of May of the next year; the second installment shall become due and collectible in one year, the third installment in two years, and fourth installment in three years after the first installment is due and collectible, as above mentioned; *provided*, however, that the owner of the property charged with the payment of such tax-bills or the owner of any interest therein shall have the privilege of paying the same in full at any time before the expiration of thirty days from the date of the issue thereof; and *provided* further, that the owner of the property charged with the payment of such tax-bills, or the owner of any interest therein, shall have the privilege of paying such tax-bills in full at any time by paying all interest thereon to a period ninety days after the date of such payment, unless such payment is made within less than ninety days of the maturity of the next installment, and then by paying interest thereon to the date when the next installment becomes due and payable. Such tax-bills, including each installment thereof, if not paid in full before the expiration of thirty days from the date of the issue thereof, shall bear interest from the date of issue at the rate of seven per cent per annum, and when any installment becomes due and collectible as herein provided, interest thereon and on all unpaid installments shall be due and collectible to that date. If any installment of any such tax-bills or interest thereon be not paid when due, then all the remaining installments shall immediately become due and collectible, together with interest thereon at the rate of ten per cent per annum from the date of issue of such tax-bills, less the sum of any interest that may have already been paid on said installments. Suits may be brought to enforce the payment of such tax-bills or any

installment or installments thereof, with all interest thereon, in the manner herein provided for the bringing of suits on other tax-bills; *provided*, however, that the owner or owners of any tract or parcel of real estate charged with the payment of such tax-bills, or the owner or owners of any interest in such tract or parcel of real estate shall, within sixty days from date of issue of the tax-bills, file with the board of public works a written statement of each and all objections which he or they may have to the validity of such tax-bills, the doing of the work, the furnishing of the materials charged for, the sufficiency of the work or materials therein used and any mistake or error in the amount thereof; and in any suit on any tax-bill issued pursuant to this section, no objection or objections to it shall be pleaded or proved other than those that have been filed with the board of public works within the period aforesaid. The lien of all tax-bills issued under this section shall continue for a period of one year after the last installments specified therein shall have become due and payable and no longer, unless within such year suit shall have been instituted to collect such tax-bill and notice of the bringing of such suit shall have been filed with the city treasurer, in which case the lien of such tax-bill shall continue until the termination of such suit and until the sale of the property under execution on the judgment establishing the same, and no default in the payment of any previous installment shall operate to diminish the period during which such lien shall continue. Such tax-bills and liens thereof shall be assignable and shall be of the same force and effect, and suits may be brought thereon in the same manner as other tax-bills issued by this city, and all other provisions relating to special tax-bills issued pursuant to the authority given in this article shall apply to those issued under this section, excepting so far only as the other provisions of this article conflict with those contained in this section.

Section 24 omitted, not important here.

Article XVII, City Charter of Kansas City:

SEC. 12. *Public Improvements—Lowest and Best Bidder—Repair by Days Work.*—All city improvements of whatever kind or character, including the erection of all public

buildings, made or to be erected at the expense of the city, and *including all work to be paid for in special tax-bills*, except as in this charter otherwise provided, shall be let by contract to the lowest and best bidder as shall be provided by ordinance; *provided*, however, that nothing in this section shall be so construed as to prevent repair by day's work of streets, alleys, and other public places, curbing, sewers, culverts, buildings or other city property, so far as may be necessary, under the direction of the board of public works.

Constitutional provisions in the various Constitutions of Missouri:

Constitution of Missouri of A. D. 1820, contained in Revised Statutes of Missouri, 1825, Vol. I, p. 59, Article XIII (13) Bill of Rights, Section 7:

"7. That courts of justice ought to be open to every person, and certain remedy afforded for every injury to person, property or character; and that right and justice ought to be administered without sale, denial or delay; and *that no private property ought to be taken or applied to public use without just compensation.*"

In revised Statutes of 1835, p. 27, Sec. 7, Art. XIII (13) Bill of Rights. Same as above.

Revised Statutes of Missouri, 1845, p. 43, Sec. 7, State Constitution Art. XIII (13), Declaration of rights, same language.

Revised Statutes of Missouri, 1855, Vol. 1, p. 83, State Constitution Art. XIII (13), Sec. 7, Declaration of rights, same language.

Constitution of Missouri, 1865, in General Statutes of Missouri, 1865, p. 23, Art. 1, Declaration of rights, Sec. XVI.

"That no private property ought to be taken or applied to public use without just compensation."

In the Constitution of Missouri of 1875 many changes were made.

Revised Statutes 1879, Vol. I, p. 57, Sec. 20, provides that no private property can be taken for private use and whether the use is public is a judicial question.

SEC. 21. Private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner or into the court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of all land taken for railroad tracks without consent of the owner, shall remain in such owner subject to the use for which it is taken.

This is yet the language of our Constitution.

Revised Statutes of Missouri, 1889, Vol. I, p. 61, Sec. 21.

Revised Statutes 1899, Vol. I, p. 66, Sec. 21, Art. II, Bill of rights. Same language.

Life, liberty and property have thus been secured in the Constitutions of Missouri:

Constitution 1820, Art. XIII, Sec. 9, p. 59, in Statutes of 1825, Vol. 1.

"That the *accused* can not be compelled to give evidence against himself, nor be deprived of life, liberty or property, but by the judgment of his peers or the law of the land.

Revised Statutes of Missouri, 1835, pp. 27, 28, Sec. 9. No change.

Revised Statutes of Missouri, 1845, p. 44, Sec. 9. No change.

Revised Statutes 1855, Vol. 1, p. 84, Sec. 9. No change.

General Statutes of Missouri, 1865 (Constitution), p. 23, Sec. XVIII. Same words.

Constitution of 1875, in Revised Statutes of Missouri, 1879, vol. 1, p. 57, Sec. 30.

"That no person shall be deprived of life, liberty or property without due process of law." These rights were secured to *the accused*. This Constitution took effect in 1875, seven years after the adoption of the Fourteenth Amendment to the Constitution of the United States.

Constitution of Missouri in Revised Statutes of Missouri, 1889, Vol. 1, p. 63, Sec. 30. Same language.

Revised Statues of Missouri, 1899, Vol. 1, p. 67, Sec. 30. Same language.

Constitution of Missouri on the subject of taxation:

Constitution of 1820, in Revised Statutes of Missouri, 1825, Vol. 1, p. 61, Sec. 19.

"SEC. 19. That all property subject to taxation shall be taxed in proportion to its value."

This has been continued to the present time.

See Constitution in Revised Statutes of 1835, p. 28. Still numbered "19" in Article XIII, Declaration of rights.

Revised Statutes 1845, of Missouri, and in 1855, 1865 and 1879. This is the Constitution of 1875.

Article X of Constitution of Missouri of 1875 is thus:

SECTION 1. *Taxing power, how exercised.*—The taxing power may be exercised by the General Assembly for State purposes, and by counties and other municipal corporations, under authority granted to them by the General Assembly, for county and other corporate purposes.

SEC. 2. *Power to tax corporations not to be surrendered.*—The power to tax corporations and corporate property shall not be surrendered or suspended by act of the General Assembly.

SEC. 3. *Taxes for public purposes must be uniform.*—Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.

SEC. 4. *Taxes in proportion to value.*—All property subject to taxation shall be taxed in proportion to its value.

SEC. 5. *Railway corporations, taxed for what purposes.*—All railroad corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes, on the real and personal property owned or used by them, and on their gross earnings, their net earnings, their franchises and their capital stock.

SEC. 6. *Property exempt from taxation.*—The property, real and personal, of the State, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities or towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also, such property, real or personal, as may be used exclusively for agricultural or horticultural societies; *provided*, that such exemptions shall be only by general law.

SEC. 7. *Other exemptions void.*—All laws exempting property from taxation, other than the property above enumerated, shall be void.

SEC. 8. *Rate for State purposes.*—The State tax on property, exclusive of the tax necessary to pay the bonded debt of the State, shall not exceed twenty cents on the hundred dollars valuation; and whenever the taxable property of the State shall amount to nine hundred million dollars, the rate shall not exceed fifteen cents.

SEC. 9. *Liability of municipalities—no commutation.*—No county, city, town or other municipal corporation, nor the inhabitants thereof, nor the property therein, shall be released or discharged from their or its proportionate share of taxes to be levied for State purposes, nor shall commutation for such taxes be authorized in any form whatsoever.

SEC. 10. *General Assembly shall not tax municipalities, when.*—The General Assembly shall not impose taxes upon counties, cities, towns or other municipal corporations or upon the inhabitants or property thereof, for county, city, town or other municipal purposes but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes.

SEC. 11. *Rates for local purposes—limits—how increased for schools and erecting public buildings.*—Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same prop-

erty in such town, city or school district for state and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation. For city and town purposes the annual rate on property in cities and towns having thirty thousand inhabitants or more shall not, in the aggregate, exceed one hundred cents on the hundred dollars valuation; in cities and towns having less than thirty thousand and over ten thousand inhabitants, said rate shall not exceed sixty cents on the hundred dollars valuation; in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the hundred dollars valuation; and in towns having one thousand inhabitants or less, said rate shall not exceed twenty-five cents on the hundred dollars valuation. For school purposes in districts, the annual rate on property shall not exceed forty cents on the hundred dollars valuation: *Provided*, The aforesaid annual rates for school purposes may be increased, in districts formed of cities and towns, to an amount not to exceed one dollar on the hundred dollars valuation, and in other districts to an amount not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are taxpayers, voting at an election held to decide the question, vote for said increase. For the purpose of erecting public buildings in counties, cities or school districts, the rates of taxation herein limited may be increased when the rate of such increase and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such county, city or school district, voting at such election, shall vote therefor. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for state and county purposes, and the rate

allowed to each city or town by the number of inhabitants, according to the last census taken under the authority of the State, or of the United States; said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness.

SEC. 12. *Municipal indebtedness, limit of.*—No county, city, town, township, school district or other political corporation or subdivision of the State, shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for State and county purposes, previous to the incurring of such indebtedness: *Provided*, That with such assent any county may be allowed to become indebted to a larger amount for the erection of a court-house or jail. *And provided further*, That any county, city, town, township, school district, or other political corporation or subdivision of the State, incurring any indebtedness, requiring the assent of the voters as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof, within twenty years from the time of contracting the same.

Sections 13 to 21 inclusive, are omitted, as not important to question in controversy.

The Constitutional validity of a State Statute is here called in question. This court has jurisdiction without regard to the amount in controversy. Revised Statutes of the United States, Section 709.

Buel vs. Van Ness, 8 Wheaton 312.
Williamson vs. Eggleston, 170 U. S. 304 at 308. ($15 involved.)
Parsons vs. District of Columbia, 170 U. S. 45.

These tax-bills are issued to pay for street paving and the language of the State law (Sec. 5, Art. IX, at end of it) is the cost "shall be charged as a special tax on the land on both sides of and adjoining the street, avenue, alley or public highway, or parts thereof, improved, *according to the frontage thereof.*"

Then this tax is levied without *reference to benefits.*

Such has been the construction of this and like statutes by our courts.

McQuiddy vs. Smith, 67 Mo. Appeals, 205 at 207 et seq. (Decided in 1896.)
Keith vs. Bingham, 100 Mo. 300. (Decided in 1889.)
Moberly vs. Hogan, 131 Mo. 19 et seq. (Decided in 1895.)

See opinion of the Missouri Supreme Court in this case. (Printed Record, p. 49.)

In case of McQuiddy vs. Smith the facts run thus:

There was a proceeding in court to ascertain if there were any damages to accrue to Smith's property by reason of the proposed grading.

The Missouri Constitution of 1875 provided that private property shall not be taken or *damaged for public use without just compensation* as quoted above. Article VIII in the City Charter is the law devoted to the subject of ascertaining damages and providing for their payment. By that law notice is to be given to all parties and an opportunity to be heard in court. In this case Smith was not a party to the proceeding and had no notice thereof and was not bound by it. The street was graded and he sued the city and recovered judgment for $2,750, for damaging his property for public use. As he was not a party to the Statute proceeding and had no notice thereof he was not bound by it. He was afterwards sued on the tax-bill for grading the street. The above facts appeared and defendant claimed that his property was not subject to this charge for doing work which was a $2,750 damage to his property. The court below rendered judgment against him and the Appellate Court affirmed the judgment, ordering the lot sold to pay its pro-rata share of the cost of doing it a $2,750 damage.

Says the court (page 210).

"So, then, it is no defense to this tax-bill that the property of these defendants may, in fact, have been injured rather than benefitted by the street grading. The judgment is for the right party and will be affirmed." "To pay for such grading, too, the city is authorized to assess against the abutting real estate the cost thereof."

"General expressions in every opinion are to be taken in connection with the case in which these expressions are used."

Cohens vs. State of Virginia, 6 Wheaton 399, language of Chief Justice Marshall quoted in opinion of the Missouri Supreme Court in the case at bar. Speaking with reference to McQuiddy vs. Smith above, we add the interpretation to the language used in construing the law. "To pay for such grading (in that case) too, the city is authorized to assess against the abutting real estate (Mr. Smith's included) the cost thereof," even if the grading did Mr. Smith's lot a $2,750 damage. *This law* made that tax-bill valid. The court so *interprets the law.*

In Keith vs. Bingham, 100 Mo. 300, defendant set up this defense (it was a grading tax-bill for grading May street in Kansas City):

"Defendant, for a third defense to the tax-bills, states that the lot described in plaintiff's petition is now, and was at all the times stated in plaintiff's petition, private property. That the grading mentioned in plaintiff's petition was done for public use, and *damaged and did not benefit said lot.* That no compensation was made or tendered to or paid into court for any person as the owner af said lot on account of said damages. Wherefore defendant asks judgment." A demurrer was sustained to this defense.

In rendering the opinion the court said: "Looking at this defense from the most favorable standpoint, it is evident that it is untenable. The section of the (State) Constitution just quoted refers to, and is intended to regulate, the exercise of right of eminent domain, whereas special assessments for local improvements, such as the tax-bills before us, are referable to, and sustainable under the taxing power. This distinction is well recognized here and elsewhere in the United States. Garrett vs. St. Louis (1857), 25 Mo. 505; Lewis on Eminent Domain, Sec.

5. If the taxing power has been called into play in the mode required by law for the purpose of paying for a local improvement, *such as paving or grading a street, it is no defense to a bill issued therefor, to say, as is said here, that the street or the improvement, damaged and did not benefit the property, though if such were the fact the party injured might have his action* (on a proper showing) under the Constitution for such injury, meaning Constitution of Missouri of 1875.

Moberly vs. Hogan 131, Mo. 19. This was a paving tax-bill like that in controversy here. The statute law involved is subdivision "Fifth," on page 91, Session Acts of Missouri Legislature A. D. 1893. It provides thus:

"Fifth." The cost of paving, etc., all streets, etc., shall be levied as a special assessment upon all lots and pieces of ground upon either side of such street, etc., abutting thereon, along the distance improved, *in proportion to the front foot.* There is no provision for supervision by any court or any hearing before any tribunal.

This was a paving tax-bill like that at bar. At the trial defendant offered to prove that the pavement was of no benefit to his lot. This testimony was objected to; the objections were sustained and the court refused to allow the defendant to show that the lot was not benefited by the paving. After an unsuccessful motion for a new trial, defendant appealed the case to the Supreme Court, 131 Mo., page 22, bottom. Says the court: "At the trial the court refused to allow defendant's offer of testimony to show that the lot was not benefited by the improvement, but that its value was destroyed thereby."

Page 24. "The trial court committed no error in excluding the defendant's evidence offered."

"The authority invested with the power of taxation for such purposes determines the occasion for the tax, and levies it upon the property subject to the tax. Where that is regularly done, in accordance with the terms of the law conferring the power, the propriety of the tax in the particular instance is not a judicial question, and it is not reviewable by the courts in the manner here attempted."

The power is to levy a tax irrespective of benefits.

The court cannot supervise or set aside this power or any action under it.

The Supreme Court of Missouri, in this very case at bar, hold that the Kansas City charter authorizes the levy of this tax without reference to benefits, and even if the work done is no benefit to the property. Near the close of the opinion in this record, on page 49 of printed record, is the following language:

"As the assessment was made in strict compliance with the charter and ordinance, we do not think the testimony of the four witnesses, to the effect that the benefits to the lots exceeded the cost of the improvement, could cure the vice, if any, in the charter and the ordinance."

"The plaintiff must stand or fall by the charter. The admission of the evidence, however, did not constitute reversible error, as we hold the charter and ordinance were sufficient without the evidence and *would have been, had it been to the contrary.*"

The construction thus put on this statute by the courts of the state become a part of it the same as if copied in it.

Chicago Union Bank et al. vs. Kansas City Bank, 136 U. S. 223, Loc Cit. 235.
Christy vs. Pridgeon, 4 Wall 196 Loc Cit, 203-4.
Detroit vs. Osborne, 135 U. S. 492 Loc Cit, 497-8-9.

The common council of Kansas City cannot determine that abutting property is benefitted and how much, because *the power to do so was never conferred.*

Corporations can exercise only such powers as are granted.

"No matter how much authority there may be in the legislature to grant a particular power, if the grant has not been made the city can not act under it."

Ottawa vs. Carey, 108 U. S. 110, Loc. Cit. 122, approved in Barret vs. Dennison, 145 U. S. 135 at 139.
Knapp vs. Kansas City, 48 Mo. App. 485 at 492.
City of St. Louis vs. Bell Tel. Co., 96 Mo. 623 at 628-9.
City of St. Louis vs. Laughlin, 49 Mo. 559 at 562.

City of Joplin vs. Lockie, 78 Mo. App. 8 at 12-3.
Ruggles vs. Collier, 43 Mo. 353 at 375.

"Their charter is the constitution which authorizes them to act; it is in the nature of a grant of powers, and they can exercise such powers and such only as are contained therein."

Ruggles vs. Collier, supra, at page 375.
City to use vs. Clemens, 43 Mo. 395 at 404.
Pacific R. R. Co. vs. Seeley, 45 Mo. 212 at 220.
City of Carondelet vs. Picket, 38 Mo. 125 at 128-9.
Zottman vs. San Francisco, 20 Cal. 96 American Decisions, Vol. 81, p. 96. An able opinion by the late Justice Field, of this court.
State vs. Smith, 31 Iowa 495 6.
Sharp vs. Speier, 4 Hill, 82-3-4-5.

By this law there is not anywhere any forum or tribunal to which the property owner can at any time apply for relief when his property is about to be taxed or assessed, or after it has been taxed or assessed.

Then this Kansas City charter is a law to levy this local tax without reference to benefits and to the extent of the excess of the cost of the work over the special and peculiar benefits to the abutting property, is a taking of private property for public use without just compensation, and thereby the State of Missouri deprives these plaintiffs in error of their property without due process of law.

Norwood vs. Baker, 172 U. S. 269 et seq.
Hutchinson vs. Story, 92 Texas, 688.
City of Norfolk vs. Young, 97 Va. 728.
Fay vs. Springfield, 94 Fed. Rep. 409.
Sears vs. Street Commissioners, 173 Mass. 350.
Dexter vs. Boston, 57 N. E. Reporter 379.
Adams vs. City, 57 N. E. Rep. 114.
McKee vs. Town of Pendleton, 57 Rep. 532.
Charles vs. City of Moline, 98 Fed. Rep. 166.
Same Case, 100 Fed. Rep. 538.
Lyon vs. Town of Tonawonda, 98 Fed. Rep. 361.
Conley vs. City of Spokane, 99 Fed. Rep. 840.
Parker vs. City of Detroit, 103 Fed. Rep. 357.
Birdnall vs. Huff, 103 Fed. 363.

When private property is taken for public use by the state or under its authority, "due process of law" embraced in the fourteenth amendment to the Constitution of the United States, requires that just compensation should be paid or secured to the owner.

Chicago, Burlington, etc., R. R. Co. vs. Chicago, 166 U. S. 226 at 235-6-7-8-9.

The balance of this brief is merely in reply to what may be urged against the decision of this court in Norwood vs. Baker, 172 U. S. 269.

Benefit alone is the foundation of this tax. Without benefit the tax is confiscation.

In addition to cases cited by this court in Norwood vs. Baker, in 172 U. S. 269 at 278-9, 280-1-2-3-4-5-6-7, we call attention to the following:

Sheehan vs. The Good Samaritan Hospital, 50 Mo. 155 at 158.

Noonan vs. Smith, 50 Mo. 525 at 528-9.

City of Carondelet vs. Pickett, 38 Mo. 125 at 131 (bottom) and 132.

State Ex Rel. R. R. Co. vs. City of Kansas, 89 Mo. 34 at 39 (bottom) and 40.

Farrar vs. St. Louis, 80 Mo. 379 (sections of Mo. Constitution on page 386) at 386-7-8-9 and 390.

Cases reviewed are all on benefits.

McCormack vs. Patchen, 53 Mo. 33 at 36, (upper half of page) and page 38.

Zoeller vs. Kellog, 4 Mo. Appeals 163 at 165 and 167-8 (cited in Norwood vs. Baker).

City of St. Louis to Use of Seibert vs. Allen, 53 Mo. 44 at 54.

City of St. Louis to Use vs. Clemens, 52 Mo. 133 at 143, upper half of page.

State Ex Rel. vs. Angert, 127 Mo. 456 at 462-3.

Kansas City vs. Ward, 134 Mo. 172 at 178-9.

Newby vs. Platte County, 25 Mo. 258.

Pacific R. R. vs. Chrystal, 25 Mo. 544 at 546 for instruction.

Louisiana and Frankford Plank Road Co. vs. Pickett, 25 Mo. 535 at 537 for instruction.

St. Louis & St. Joseph R. R. Co. vs. Richardson, 45 Mo. 468, at 468 (bottom of page) and 469.
Lee vs. Tebo & Neosho R. R. Co., 53 Mo. 178 at 179 and 180.
Mississippi River Bridge Co. vs. Ring, 58 Mo. 491 at 497.
John Hosher vs. Kansas City, etc., R. R. Co., 60 Mo. 303 at 304.
State Ex Rel. Farron vs. City of St. Louis, 62 Mo. 244 at 246, upper third page, blending eminent domain and taxing tower.
City of Springfield vs. Smock, 68 Mo. 394 at 395-6.
Wyandotte, K. C. & N. R. R. Co. vs. Waldo, 70 Mo. 629; instruction at 631-2.
Combs vs. Smith, 78 Mo. 32 at 39 and 40.
Jackson County vs. Waldo, 85 Mo. 637 at 638; middle of page, for instructions.
State Ex Rel. vs. Kansas City, 89 Mo. 34 at 41-2-3.
McReynolds vs. Kansas City R. R. Co., 110 Mo. 484; instructions 487-8.
Dougherty vs. Brown, 91 Mo. 26 at 31.
Bryan vs. Kansas City & S. E. R. R. Co., 111 Mo. 462-3 for instruction.
St. Louis, K. & N. R. R. Co. vs. St. Louis Stock Yards Co., 120 Mo. 541 at 558; instruction assumes special benefit; 137 Mo. 377 instruction at 383, top, and comments referring to 110 Mo. at 484.
Fowler vs. Rothan, 142 Mo. 670 at 679 and 680 to page 685.
Stuart vs. Palmer, 74 N. Y. 183 at 189.

"Assessments for local improvements can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid, and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional."

Krily vs. Shaw, 19 Penn. 258.
Schenly vs. Commonwealth, 36 Penn. 29.

McGonigle vs. Alleghany City, 44 Penn. 118. In the matter of Washington Avenue, 69 Penn. 360.
Patterson vs. Society, etc., 24 N. J. 385.
Tide Water Co. vs. Coster, 18 N. J. Eq. 519. In the matter of Drainage of Lands, 35 N. J. 497.
St. John vs. East St. Louis, 50 Ills. 92.
Lee vs. Ruggles, 62 Ills. 427. In the matter of Albany street, 11 Wend. 149.
Litchfield vs. Vernon, 41 N. Y. 123.

Special assessments on real estate for benefits conferred has long been established in Missouri. The decisions began in Missouri under Revised Statutes of Missouri, 1845, p. 974, sec. 17.

"SEC. 17. In assessing such damages the commissioners shall take into consideration the *advantages as well as the disadvantages of the road to such persons.*"

A State road was opened in Platte county, Missouri. Commissioners were appointed by the county court. They viewed the route for the proposed road and assessed damages to Mr. Newby. He was dissatisfied and appealed the case to the Circuit Court where the case was tried *de novo*. A jury was waived. One acre and a half of land was taken, worth $15 per acre. Newby asked an instruction to the effect that he was "entitled to the value of the land taken for the road and that the advantages of the road to him could not be set off against his claim for the value of the land." This was refused, and the court decided that the plaintiff Newby was not entitled to any money compensation for the land taken for the public use.

Speaking of the clause in the Missouri Constitution about taking private property for public use the court says (25 Mo. 262):

"The questions, therefore, that have been discussed in the courts in the construction of this clause—which is to be found in almost every American Constitution—are what is a public use within the meaning of this provision, and what is the just compensation required by the Constitution? Must it be the whole money value of the property without any deduction? Or is it competent for the legislature to provide that the increased value imparted to the residue of the party's land by the use to which the part

taken is applied shall be deducted from the compensation to be paid? And the last is the question involved in the present case."

"When part is taken, just compensation includes damages to the remainder. Upon this point there is entire unanimity of opinion."

Lewis, on Eminent Domain, Second Edition (A. D. 1900), vol. 2, page 998, sec. 464.

Newby vs. Platte Co., 25 Mo. 258 at 264, the court says:

"The government, however, possesses other powers over private property besides the right of eminent domain; and if in the exercise of the taxing power, the government may lawfully require the adjacent land owners to contribute towards paying for the right of way in proportion to the benefit each will derive from the road, the present enactment, so far as it directs the advantages of the road, to be deducted from the price of the land, must perhaps be considered as an exercise of the taxing power."

Then the court says here is an exercise of both powers in the same case. First—The power of eminent domain, whereby court and jury ascertain the value of the property taken and damages, if any, to the remaining land, and then court and jury ascertain if there are any benefits to the remaining land, and if so, how much. Here again court and jury act judicially. This law authorizing court and jury to ascertain if there are any benefits, how much, and deduct the amount from the compensation is a tax law and the process is taxation.

But here another difficulty appears. The Constitution of Missouri provides that—

"All property subject to taxation shall be taxed in proportion to its value."

The objection urged was here property is taxed, but is not taxed in proportion to its value, but in proportion to benefits.

The answer was, this is not a tax on property; it is a tax on benefits. "The question is as to the constitutional validity of taxes imposed by a subordinate authority in the state upon an arbitrary district of country in proportion not to the value of the property, but to the benefit to be derived by the owner from the improvement."

Again, page 272, says the court:

"But we cannot suppose it was the intention of the people of this state to suppress entirely that large class of assessments, felt to be so just and equitable and which for that reason had been introduced so generally into practice, in which each is required to contribute to the burden in proportion to the benefit he derives from the expenditure. When the taxation is against one in respect to his property as property when he is assessed for a property tax, the assessment must be according to the assessed value of the taxed property, but here the property is assessed in respect to the benefit he derives from the improvement. *It is a tax on the benefits rather than a tax on the property, and therefore is not obnoxious to the constitutional prohibition we are now considering.*"

Garrett vs. St. Louis, 25 Mo. 505. Garrett owned land; part was condemned for public use, leaving part of his land. The jury assessed the land taken at $768.45 and the buildings at $1,440, making in the aggregate $2,208.45. The jury assessed his remaining land with a benefit of $763. Garrett wanted the $2,208.45 due him. The city refused to pay unless this $763 benefit is deducted. Page 511 "the phrases" "benefits" and "increased value" may therefore be regarded as convertible terms; and if the constitutional provision referred to is to be considered as applicable to this kind of taxation, *it would seem that the spirit, if not the very letter, of its injunctions has been embodied in the act. The tax is exactly proportioned according to the increased value of the lot, which is the same thing as the value of the "benefit" which the owner receives from the improvement.* As property is taxed according to value, so benefits are taxed according to value. As we tax property according to value of the property, so we tax benefits according to value of the benefit.

Newby vs. Platte, 25 Mo. 258 at 264:

"This is, indeed, nothing more in effect than the exercise of both powers of government in the same breath—that of taking the land by the right of eminent domain, and of requiring, under the taxing power, the adjacent land owners to contribute to the cost of it in proportion to the benefit each will derive from the road."

The earlier cases in Missouri proceeded on the theory of Norwood vs. Baker, i. e., that the land is taken to the extent of the assessment levied on it and that to the extent of the excess of the cost of the work over and above any special and peculiar benefits, the land is taken for public use without just compensation.

The earlier cases came up on road laws and condemnations.

Newby vs. Platte County, 25 Mo. 258.
Walter vs. Warner, 25 Mo. 277.
Garrett vs. St. Louis, 25 Mo. 505.
North Missouri Railroad Company vs. Lackland, 25 Mo. 515.
Louisiana and Frankfort Plank Road Co. vs. Pickett, 25 Mo. 535.
North Missouri Railroad Co. vs. Gott, 25 Mo. 540.
Pacific Railroad vs. Chrystal, 25 Mo. 544.
Inhabitants of Palmyra vs. Morton, 25 Mo. 593.

All the above cases except the last are condemnation cases.

In all these cases the courts act judicially in ascertaining "just compensation," and not as a special tribunal.

North Missouri Railroad Company vs. Lackland, 25 Mo. 515 at 526.

The "advantages" spoken of in Newby vs. Platte Co. 25 Mo. 258, and the benefits spoken of in the St. Louis charter, in Garrett vs. St. Louis, must have "some limit." The benefits, or advantages, are limited to special peculiar exceptive benefits, and if not so limited the road law in contest in Newby vs. Platte County, and St. Louis charter in contest in Garrett vs. St. Louis are in violation of the Constitution of the State, as taking private property for public use without just compensation.

In Pacific Railroad vs. Chrystal, 25 Mo. 544 at 546, this instruction was given below:

"That said commissioners, in forming their estimate, make due allowance or deduction for any advantages or benefits which the said William Chrystal will derive from the said Pacific railroad, but not allowing him the benefit of any rise in land in consequence of the survey." Says the court:

"In the case of Newby vs. Platte County (ante p. 258, this court held that 'The benefits to be charged the land owners whose lands are taken for a railroad and deducted from the compensation to be allowed for the value of the land taken and the injury resulting to other adjoining land, must be the direct and peculiar benefits which result to them in particular, and not the general benefits they derive in common with other land owners in the vicinity from the building of the road.'" Continuing, the court says:

"The value of the land taken means its actual value independent of the road. The disadvantages spoken of by the act are the injuries arising from the taking of only a part of a tract which, from a variety of causes, may more or less impair the value of the part left, or entirely destroy its value." It is manifest that the order of the court to the commissioners did not conform to these principles. The judgment is reversed for this reason.

State Ex Rel. vs. St. Louis, 62 Mo. 244 at 246, says the court: "The most serious objection which has ever arisen in my own mind to some of the conclusions reached in the foregoing cases (Newby vs. Platte County, Walter vs. Warner and Garrett vs. St. Louis) is, that under, and in accordance with them, by a blended exercise of the taxing power and the right of eminent domain, the taxing power *may be so used as to impair, if not destroy, some of those rights to which the property owner is entitled under a constitutional exercise of the right of eminent domain.*"

The Supreme Court of Missouri has gone further in condemnation cases, and (under a law requiring court and jury to ascertain the actual value of the property taken and damages to property not taken, making one sum, and then ascertaining the amount of benefit to the public in general, and, second, the benefit to each piece of property) held that if the benefits to the public added to the benefits to individuals be less than damages assessed, then no condemnation can be had under such law for the reason that private property will be thereby taken for public use without just compensation, either in deducting something from the just compensation or in selling the benefited land for a sum exceeding the benefits, and to such excess tak-

ing the land assessed for public use without just compensation to the extent of the excess above actual benefits.

Tyler vs. St. Louis, 56 Mo. 60 at 63 bottom, 64 bottom.
City of Kansas vs. Baird, 98 Mo. 215 at 220-1.

This is common knowledge at the bar. The juries are so instructed.

Other courts have held the front foot rule invalid on constitutional objections of inequality of burdens, but all are on same basis, as in Norwood vs. Baker.

Peary vs. Little Rock, 32 Ark. 31.
McBean vs. Chandler, 9 Heiskil 349.
City of Lexington vs. McQuillin's heirs, 9 Dana 513.

On this question of taxation of benefits or for benefits from the admission of the State up to 1868, the time of the adoption of the Fourteenth Amendment, I have not been able to find in the courts of Missouri any other cases on this subject except the following, nine cases being in 25 Mo. as follows:

Newby vs. Platte County, 25 Mo. 258.
Walther vs. Warner, 277. (A judgment and execution is not compensation.)
Garrett vs. St. Louis, 25 Mo. 505.
North Missouri Railroad vs. Lackland, 25 Mo. 515.
Same vs. Regnal, 25 Mo. 534.
Louisiana and Frankford Plank Road Co. vs. Pickett, 25 Mo. 535.
North Missouri Railroad Company vs. Gott, 25 Mo. 540.
Pacific R. R. vs. Chrystal, 25 Mo. 544.
Inhabitants of Palmyra vs. Morton, 25 Mo. 593.
Egyptian Levee Company vs. Hardin, 27 Mo. 495.
City of St. Joseph vs. Anthony, 30 Mo. 541-2.
City of St. Joseph vs. O'Donoghue, 31 Mo. 345.
Powell vs. St. Joseph, 31 Mo. 347.
Risley vs. St. Louis, 34 Mo. 404.
City of St. Louis vs. Hardy, 35 Mo. 261.
City of St. Louis vs. Creamer, 36 Mo. 467.
City of St. Louis vs. Oeters, 36 Mo. 456.
City of St. Louis vs. Clemons, 36 Mo. 467.
City of St. Louis to use of Lohrum vs. Coons, 37 Mo. 44.

Fowler vs. St. Joseph, 37 Mo. 228.
Carondelet vs. Pickett, 38 Mo. 125.
City to use vs. Armstrong, 38 Mo. 29.
City to use vs. Armstrong, 38 Mo. 167.
Columbia Bottom Levee Company vs. Meier, 39 Mo. 53.
Abbott vs. Lindenbower, 42 Mo. 162.

Of the nine cases reported in 25 Mo. all except one are condemnation cases wherein court and jury determine the value of the land and damages to remaining land, if any, and then *court and jury ascertain what are the advantages or benefits to the adjoining land, how much, if any, are these advantages, under the instruction of the court, that the advantages or benefits they are to consider are the advantages or benefits specially and peculiarly belonging to the property, and not shared by other property in the neighborhood. They do this so as not to take for public use (by this power of taxation) without just compensation, either the land or its exact equivalent, "just compensation."*

A statute in Missouri authorizing a levy of local taxes of the kind in suit on abutting property according to frontage on the street paved to pay the cost of such paving, is void if it authorize a personal judgment or the distraint or sale of property other than that taxed, or if it create any other liability than an impost on the property itself.

Such a law, although a law for local taxation, and although not expressly authorized in the state constitution, nor expressly prohibited in terms by the state constitution of Missouri, is yet restrained and controlled by the express provision of the state constitution that "Private property shall not be taken (or damaged) for public use without just compensation."

Neenan vs. Smith, 50 Mo. 525 at 529 and 530.
City of St. Louis to use of Seibert vs. Allen, 53 Mo. 44 at 50-1-2-3-4-5-6-7. (A tax-bill for street paving). A leading case followed and approved in Carlin vs. Cavender, 56 Mo. 286 at 289.
St. Louis to use vs. Bressler, 56 Mo. 350 at 351.
Straesheim vs. Jerman, 56 Mo. 104 at 106—bottom of page.

Seibert vs. Allen, 61 Mo. 482 at 488—near mi
of page.
City of Louisiana vs. Miller, 66 Mo. 467.
Higgins vs. Ausmus, 77 Mo. 351 at 353.
Inhabitants of the Village of Hustonia vs. Gru
80 Mo. Appeals 433 at 436—lower two-third
page.
City of Pleasant Hill vs. Dasher, 120 Mo. 67
679 and 680.
The City of Clinton to use of Thornton et al.
Henry County, 115 Mo. 557 at 569 and 570.
Seibert vs. Copp, 62 Mo. 182 at 186-7.
The State Ex Rel. vs. Angert, 127 Mo. 456 at
—near bottom of page—page 463, top.
Stadler Admx. vs. Roth, 59 Mo. 400 at 401, b
tom, and 402, top. (Neenan vs. Smith has ov
thrown all statute laws of Missouri on spec
tax-bills.)
Syenite Granite Co. vs. Bobb et al., 37 Mo. A
peals 483, at bottom page 485, top 486.
Zoeller vs. Kellogg, 4 Mo. Appeals 163 at 164
6-7-8.

The Supreme Court of Missouri has gone further a
held that the legislature of the state cannot authorize t
local government of the towns and cities in Missouri
tax persons or property or occupations outside the tow
or city limits; that such taxation is a taking under th
guise of taxation of private property for *private* us
against an implied prohibition in the state constitution t
do so.

Wells vs. Weston, 22 Mo. 384 at 388-9 and 390-1.
City of St. Charles vs. Nolle, 51 Mo. 122 at 124-5-6
The Town of Cameron vs. Stephenson, 69 Mo. 37
at 378-9.
The State vs. Addington, 12 Mo. Appeals 214 a
221, top of page; affirmed in 77 Mo. 110 at 116
beginning of opinion.
Dickey vs. Tennison, 27 Mo. 373 at 374-5-6.

We ask your attention to a few of these cases.

Neenan vs. Smith, 50 Mo. 525 at 529 and 530.

This was a suit on special tax-bills for macadamizin
Frederick Avenue in St. Joseph, Mo. The question cam

up on the construction of a statute. Plaintiff obtained judgment below against the defendant personally and also enforcing a lien on the lot. The court distinguishes this particular kind of taxation and says, p. 528, at bottom:

"There is a broad distinction, and one of universal recognition, between the foundation upon which is based the right of general taxation for governmental purposes and that which supports the rights of local assessments. The authority to impose either is referred to the taxing power; but the object of one, as giving the authority, widely differs from that of the other."

All taxation is supposed to be for the benefit of the person taxed. That for raising a general revenue is imposed primarily for his protection as a member of society, both in his person and property in general, and hence the amount assessed is against him, to be charged upon his property, and may be collected of him personally. But, on the other hand, local taxes for local improvement are merely assessments upon the property benefited by such improvements, and to pay for the benefits which they are supposed to confer; the lots are increased in value, or better adapted to the uses of town lots, by the improvements.

Upon no other ground will such partial taxation for a moment stand.

Other property held by the owner is affected by the improvement precisely and only as is the property of all other members of the community, and there is no reason why it should be made to contribute, that does not apply equally to that of all others.

The sole object, then, of a local tax being to benefit local property, it should be a charge upon that property only, and not a general one upon the owner. *The latter, indeed, is not what is understood by a local or special assessment, but the very term would confine it to the property in the locality; for, if the owner is personally liable, it is not only not a local assessment, but also a general one as against the owner.* The reasonableness of this restriction will appear when we reflect that there is no call for a general execution until the property charged is exhausted. If that is all sold to pay the assessment, leaving a balance to be collected otherwise, we should have the legal anomally—the monstrous injustice—of not only

wholly absorbing the property supposed to be benefited and rendered more valuable by the improvement, but also of entailing upon the owner the loss of his other property."

Then, after stating that certain cases were overruled, the court says, p. 530:

"The construction given above is not only more reasonable, but I greatly doubt *whether the legislature has the power to authorize a general charge upon the owner of local property which may be assessed for its especial benefit, unless the owners of all taxable property are equally charged.* As to all property not to be so specially benefited, he stands on the same footing with others; he has precisely the same interest, and should be subject to no greater burdens."

"When such burden is sought to be imposed on lands not in themselves constituting a political subdivision of the state, we at once approach the line which is the boundary between acts of taxation and acts of confiscation." Norwood vs. Baker, 172 U. S. at 282-3. In the Missouri case quoted from, it is not stated what special provision of the Missouri constitution is violated. That is stated in the case of The City of St. Louis to use of Seibert vs. Allen, 53 Mo. 44.

This was a suit on two tax-bills for paving a street in St. Louis. The authority of the city council may be found in Missouri Laws (Session Acts) 1865-6, p. 295, secs. 10 and 11, Session Acts 1867, pp. 73-4. The charge is to be made "in proportion to the frontage." The work was done in front of Allen's property on the Gravois road in St. Louis, Missouri. A personal judgment had been rendered in the lower court and the question was on the constitutional validity of the statutes authorizing such personal judgment.

Says the court, p. 50:

"It is contended by the respondent, that this question has been directly settled by this court by various decisions heretofore rendered, and that said question has also been settled by the adjudged cases in other States."

This is the whole reasoning in the first case in Missouri, and in this one at bar.

Inhabitants of Palmyra vs. Morton, 25 Mo., 593 at 595, bottom half of page.

"The subject has been thoroughly discussed, and every principle bearing on it severely analyzed, in almost every State of the Union where the power has been exercised; and it is now as firmly established as any other doctrine of American law."

Continuing, p. 50, the Supreme Court of Missouri says:

"Several cases are referred to where personal judgments have been rendered upon assessments, which are contended to be identical in their legal effect with the ones sued on in this case."

"In the case of the City of St. Louis to the use of McGrath vs. Clemens, 36 Mo. 467, it is certainly held by the court, that a personal judgment is proper in a case like the one under consideration; but the point made in that case was not whether the legislature had the constitutional power to authorize a municipal corporation to make local improvements in their territorial limits, and charge the cost thereof to the adjoining lots or land, and make the owners of such land or lots personally liable to pay for said improvements, on account of any supposed benefit that the improvements might be to the property, and then by a general personal judgment against the owner of the lot sell not only the lot or lands against which the assessment was made, and which was supposed to be benefited, but also any other property of the owner to pay the judgment; but the point raised and decided in that case was, whether under the state of the pleadings in that case a general personal judgment could be rendered, or whether, by the language of the statute and ordinances under which the work was done, a personal judgment could be rendered against the owner of the lots charged with the assessment. The constitutional power to authorize the rendition of a personal judgment in such case was not considered or argued, and the same may be said as to the cases of the City of St. Louis to the use of Lohrum vs. Coons, 37 Mo. 44; Fowler vs. City of St. Joseph, 37 Mo. 228, and The Inhabitants of Palmyra vs. Morton, 25 Mo. 593. In none of these cases, nor in any other case in this state, was the constitutional power to make these local improvements, and assess the cost against the adjoining property, and then recover a per-

sonal judgment against the owner of the property for the amount assessed, ever brought directly in question or discussed." The court then refers to the different constitutional provisions in different states in authorizing "taxes" and "assessments," and the court quotes approvingly from Taylor vs. Palmer, 31 Cal. 240, thus:

P. 53, bottom. "In Emery vs. Bradford, 29 Cal. 88, we held that a personal judgment was authorized by the statute, but whether the statute was in that respect constitutional was not considered. Be that as it may, it is clear that it was not decided."

"*To say that the owner of land bordering upon an improved street can be made personally responsible for the payment of the improvement*, is equivalent to saying *that his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether benefited or not, shall be held responsible for the tax.*"

"It is well settled by the decisions of this court that assessments like those sued on are not regarded as a tax, but as an assessment for improvements, and are not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derived from the improvement."

Quoting from Carondelet to the use vs. Picot, 38 Mo. 125, this language:

"The city has a lien on the property, the contractor has not. It may be said that the property may not be sufficient to pay the assessment, it is a sufficient answer to this to say that it will not be presumed, that it was ever intended that a corporation in the exercise of this high prerogative power *should absorb the whole value of a person's property, and then come on him for the deficit.*"

"The very idea of such an assumption on the part of either the city or the state legislature would be sufficient to startle one who had even the most crude notion of the objects and purposes of a just and enlightened government. The idea that a city could improve a street and assess the property benefited thereby, and sell the entire property, and then go on the owner of the property, who may reside out of the city, and sell his property there to pay the balance of the assessment, and this all in consideration of the benefit conferred on his property, which was already sold, would seem at least in its results like taking the property of the owner and converting it to

public use without any just compensation. I do not believe that by this indirection you can do that which is forbidden by the constitution if directly done. If a personal judgment can be rendered in such case, all this may happen. It is true, it is not likely to happen, but the fact that it *MAY POSSIBLY* happen is enough to condemn the law."

"If you can assess the lot of a non-resident of the city for improvements made in one of the streets in the vicinity of the lot, and sue the owner of the lot, get a personal judgment, sell the lot for less than the amount of the judgment, and collect the balance from the owner out of the other property without the city limits, you have in such case *certainly taken his property and converted it to the use of the city, and if he has in such case received any just compensation it is difficult to perceive it. This would enable the city to do that by an indirection, which could not be done directly. If we construe the statute in reference to these assessments to authorize a personal judgment, by which such results might follow, it would make the statute unconstitutional and void.*"

Then the court quotes from Neenan vs. Smith, 50 Mo., quoted before in this brief, page 42.

This St. Louis tax law for macadamizing Gratiot street in St. Louis, allowing a personal judgment against the owner, is in contravention of that section of the Missouri constitution which provides that—

"Private property shall not be taken for public use without just compensation."

To say that the owner is personally liable is equivalent to saying "That his entire estate, real, personal and mixed, whether bordering upon the street or remote from it, whether benefited or not, shall be held responsible for the tax."

Property remote from the street, not benefited, cannot be sold. The reason intimated, or given, is that to do so would violate the rule of constitutional law, that "Private property shall not be taken for public use without just compensation."

Property bordering on the street, not benefited, ought not to be sold. "The idea * * * * (personal liability), would seem at least in its results like taking the property

of the owner and converting it to public use without any just compensation."

City of St. Louis vs. Allen, 53 Mo. at 55.

To sell abutting property not benefited "would seem at least in its results, like taking the property of the owner and converting it to public use without any just compensation."

In Higgins vs. Ausmus, 77 Mo. 351: Mr. Higgins owned a lot in Linneus, in Linn county, Missouri. The sidewalk in front of it needed repairs which were made by the city authorities and taxed to the abutting property belonging to Mr. Higgins. All his taxes were delinquent. The tax-book was in the hands of Ausmus, as county collector. This tax-book was authority to seize and sell personal property to pay general taxes. Mr. Higgins paid all taxes except this sidewalk tax. He denied the validity of this tax. Mr. Ausmus, the collector, levied on some stoves belonging to Mr. Higgins. Mr. Higgins replevied the stoves before a justice of the peace. He was successful there and on appeal in the Circuit Court, and again in the Supreme Court of Missouri. The Supreme Court hold that the tax-book conferred no authority and could confer no authority to take or sell the stoves. He must look alone to the land. To sell the stoves would be taking them for public use without just compensation. While the court does not say this in terms, this is the necessary result of the decision. (Page 353, top half of page.)

City of Pleasant Hill vs. Dasher, 120 Mo. 675, was a suit begun before a justice of the peace to collect $19.23 for labor done and material furnished in building a plank sidewalk along a street in front of two lots owned by defendant, Charles W. Dasher. The case went to the Circuit Court on appeal where defendant had judgment, and on appeal to the Supreme Court of Missouri the judgment was affirmed.

In rendering the opinion, Black, Judge, said:

"The claim made by the city in the Circuit Court and repeated here is this: That the city was entitled to a personal judgment against the defendant for the work

done and materials furnished in the construction of the sidewalk, and this claim stands on the eleventh section of the charter."

As similar statutes were so very common and they were all so completely overthrown by the Supreme Court of Missouri in City of St. Louis to use vs. Allen, 53 Mo. 44, that we copy the section eleven referred to. (120 Mo. 675 at page 678, fifth line from the top.)

"The council shall have power to cause the owners or occupiers of real estate to pave and repair sidewalks adjacent to the property which they may own or occupy; and if any such owner or occupier shall fail to pave or repair the same, as required by ordinance, the council may cause the same to be done, and may recover the full expense thereof by an action of debt in the name of the corporation."

The court says, p. 679, eight line from top:

"The defendant insists: First, Said eleventh section is unconstitutional and void; second, it was repealed by the Act of 1887; and third, the justice had no jurisdiction of this action." After comparing the two Acts, the one giving a personal liability, the other merely a lien, the court proceeds:

"In short, does the Act of 1887 repeal section 11 of the charter? In disposing of this question it is well to bear in mind the former adjudications of this court. Neenan vs. Smith, 50 Mo. 528, was an action to collect tax-bills for macadamizing a street. It was held that plaintiff was not entitled to a general judgment against the owner of the land, and doubt was expressed whether the legislature had the power to authorize a general judgment in such cases. The authorities on this question were reviewed in the subsequent case of St. Louis to use vs. Allen, 53 Mo. 44, and it was held in clear and distinct terms that the legislature had no such power to authorize a personal judgment against the property owner in suits to recover these local assessments. The ruling made in that case has been approved in a number of subsequent cases." * * *

"The Act of 1887 was no doubt passed in view of what was said by this court in the case of the City of St.

Louis to use vs. Allen, supra, and repeated in subsequent cases."

These three cases—City of St. Louis to use vs. Allen, 53 Mo. 44; Higgins vs. Ausmus, 77 Mo. 351, and City of Pleasant Hill vs. Dasher, 120 Mo. 675—have rendered void nearly all special tax laws in the state. Personal liability was generally the statute rule in this (Missouri) country from 1807 to 1889.

Laws of Louisiana Territory, part 1, page 259, sec. 5—(A. D. 1807).
Geyer's Digest (A. D. 1818), p. 418, sec. 5.
Revised Statutes of 1825, vol. 2, p. 766, sec. 5.
Revised Statutes, 1835, p. 602, sec. 7.
Revised Statutes, A. D. 1845, p. 1050, sec. 9.
Revised Statutes, A. D. 1855, vol. 2, p. 1526, sec. 7, and sec. 12, p. 1527.

Action of debt is now a "civil action."
General Statutes, 1865, p. 242, secs. 12-13-14-15.
Revised Statutes, 1879, vol. 2, p. 995, sec. 5015.
Personal liability abandoned first in statutes of Missouri, 1899, vol. 2, p. 1411, secs. 6015-6—and a lien only given.
Revised Statutes of Missouri, 1889, vol. 1, p. 464, sec. 1677.

St Louis charter (laws of Missouri, 1822-3, p. 42, sec. 13), "Levy a tax *on the holders* of lots" for paving the street. How could this statute be now enforced? There are these difficulties in the way. This paving tax in St. Louis in 1822-3 was not a lien on the property, because the statute of its creation did not make it a lien. They could not sue for the tax. There was no authority for that, and if the city could sue she could get no personal judgment. She could not distrain and sell personal property, for that would have been contrary to the doctrine of Higgins vs. Ausmus, 77 Mo. 351. Apply this doctrine enunciated in these three cases—City of St. Louis vs. Allen, Higgins vs. Ausmus and City of Pleasant Hill vs. Dasher—to the law in Inhabitants of Palmyra vs. Morton, 25 Mo. 593. The statute is quoted in the opinion thus:

The tenth section gives them power "To have the footways and sidewalks of streets paved at the expense

of the owners and occupiers of the adjacent lots; and if such owner or occupier fail to pave the same, as directed by ordinances, said trustees shall pave the same and recover the full expense thereof from such owner or occupier by action of debt."

Now, how will be the decision of the Missouri Supreme Court? A personal judgment cannot be rendered; that would take private property for public use without just compensation. There is no lien on the property because the statute gives none. At general common law, where a public highway is improved in front of and immediately adjoining private property, if the private property is damaged, the owner cannot recover the damages, and if the work is a benefit the public cannot recover for the benefit conferred. There could be no recovery at general common law.

In Missouri prior to A. D. 1855, we had few or no exemptions, and imprisonment for debt was the rule.

Laws of Louisiana Territory, Part I, pp. 115-6, secs. 42-3 (A. D. 1807).

Geyer's Digest (1818) p. 256, secs. 61 and 63.

Revised Statutes of Mo. (A. D. 1825), Vol. 1, p. 363, sec. 2.

Revised Statutes of Mo. (1835) p. 253, secs. 2, 3 and 5.

Revised Statutes of Mo. (1845) p. 574, sec. 1.

Imprisonment for debt abolished November 17th, 1855. See Revised Statutes 1855, Vol. 1, p. 853, sec. 1.

With imprisonment for debt in force and with little or no exemptions in force, there was no necessity for a special lien on the particular real estate. The general judgment and execution took all the party had and all he afterward acquired until the statute liability was paid.

An action of debt was allowed in the charters of most Missouri towns and cities. (See Acts 1832-3, p. 104, secs. 3 and 4.) The remedy was, first, sell goods; second, action of debt; third, collect rents; fourth, sell the land. This is the charter of St. Charles, Missouri. Session Acts 1836-7, p. 308, secs. 8 and 10, similar law in all respects.

The earlier laws of Missouri did not conform to modern ideas of the constitutional rights of the citizen.

In opening roads if the owner refused to dedicate the law instructed the commissioners appointed to asses damages thus: "And provided, also, that nothing shal be allowed to any person or persons, where such roa passes through his or their unimproved lands."

Geyer's Digest, A. D. 1818, pp. 354-5, copied fro Laws of Missouri Ter. 1813, p. 71.
Rev. Stat. of Mo. A. D. 1825, Vol. II, chap. 1.
Roads and Highways, p. 688, sec. 3, on p. 68 bottom, and top 690, same language.

In the City of St. Louis to the use of Seibert vs Allen, 53 Mo. 44, the Supreme Court of Missouri sa that if a general judgment be allowed, a general exemp tion may be issued, the benefited property may be sol and then other property remote from the street not bene fited may be sold, this remote property not benefited wil be taken for public use without just compensation.

The Court say: "But the fact that it may possibl happen is sufficient to defeat the law."

This is general law. We test the constitutiona validity of a statute by what may be done under it, no what has occurred.

Stuart vs. Palmer, 74 N. Y. 188, Earl, Judge, ren dering the opinion said: "It matters not upon the ques tion of the constitutionality of such a law, that the as sessment has, in fact, been fairly apportioned. The con stitutional validity of law is to be tested, not by wha has been done under it, but what may, by its authorit be done." This language is quoted with approval in Gil man vs. Tucker, 128 N. Y. 190 at 200.

Colon vs. Lisk, 157 N. Y. 188 at 194-5.

"In discussing the constitutionality of this Act, it i to be remembered that the question is to be determine not by what has been done under it in any particular in stance, but by what may be done under and by virtue o its authority."

Stuart vs. Palmer, 74 N. Y. 183.
Gilman vs. Tucker, 128 N. Y. 190-200.
Brown vs. City of Denver, 7 Col. 305 at 312.

Dexter vs. City of Boston, Supreme Judicial Court of Massachusetts, Suffolk, May 22, 1900. North East Reporter, Vol. 57, No. 5, June 15, 1900, page 379 at 380.
Collins vs. New Hampshire, 171 U. S. 33, 34.
Henderson vs. Major, 92 U. S. 268.
Minnesota vs. Barber, 136 U. S. 313 at 319.

It is said that the case of Norwood vs. Baker is inconsistent with other decisions of the Supreme Court of the United States, and the cases of Davidson vs. New Orleans, 96 U. S. 97; Waltson vs. Nevin, 128 U. S. 578; Spencer vs. Merchant, 125 U. S. 345; Stanley vs. Supervisors, 121 U. S. 535; Mobile vs. Kimball, 102 U. S. 691; Hager vs. Reclamation District, 111 U. S. 701; United States vs. Memphis, 97 U. S. 284; Laramie Co. vs. Albany Co., 92 U. S. 307; Wurtz vs. Hoagland, 114 U. S. 606; Railroad vs. Richmond, 96 U. S. 521; Hallbrook Irrigation District vs. Bradley, 164 U. S. 112, and Parsons vs. Columbia, 170 U. S. 56-7 are cited.

In Davidson vs. New Orleans, supra, the language of the court is as follows:

"That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.

"It may violate some provision of the State constitution against unequal taxation; but the Federal constitution imposes no restraints on the states in that regard. If private property be taken for public uses without just compensation, it must be remembered that when the fourteenth amendment was adopted the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken. It may possibly violate some of those principles

of general constitutional law, of which we could tak jurisdiction if we were sitting in review of a Circui Court of the United States, as we were in Loan Associa tion vs. Topeka, 20 Wall, 655. But, however this ma be, or under whatever other clause of the Federal consti tution we may revive the case, it is not possible to hol that a party has, without due process of law, been de prived of his property, when, as regards the issues affect ing it, he has, by the laws of the state, a fair trial in court of justice, according to the mode of proceeding ap plicable to such a case. This was clearly stated by thi court, speaking by the Chief Justice, in Kennard vs. Mor gan, 92 U. S. 4800, and, in substance, repeated at th present term, in McMillan vs. Anderson, 95 id 37."

In Walston vs. Nevin, supra, this language is repeat ed, and it is the ground of the decision on that question.

In Kennard vs. Morgan, 92 U. S. 480, cited as au thority for this doctrine, the question was whether Kim ball had been deprived of his office without due process o law. The court said:

"The question before us is not whether the court below having jurisdiction of the case and the parties hav followed the law, but whether the law, if followed, woul have furnished Kennard the protection guaranteed by th constitution. * * * From this it appears that ampl provision has been made for the trial of the contestatio before a court of competent jurisdiction; for bringing th party against whom the proceeding is had before th court, and notifying him of the case he is required t meet; for giving him an opportunity to be heard in hi defense; for the deliberation and judgment of the court for an appeal from this judgment to the highest court o the state, and for hearing and judgment there. A mer statement of the facts carried with it a complete answe to all the constitutional objections urged against th validity of the act."

The substance of the decision in McMillan vs. Ander son, 95 U. S. 37, also cited in the above opinion, is fairl given in the head note of the case:

"A statute which gives a person against whom taxe are assessed a right to enjoin their collection and hav their validity judicially determined, is due process of law

notwithstanding he is required, as in other injunction cases, to give security in advance."

The effect of these decisions extends only to the proposition that the regular proceedings, upon due notice, in a court of competent jurisdiction, constitute due process of law.

Spencer vs. Merchant, 125 U. S. 345, is a case still more frequently and earnestly insisted on as being inconsistent with the doctrine of the Norwood case, but when that case is fairly examined it will be seen that it stands upon the precise ground upon which the cases of Davidson vs. New Orleans and Kennard vs. Morgan were decided. The court, in its opinion, quotes the decision of the New York Court of Appeals in the case.

The portion cited is as follows:

"These views furnish also an answer to the objection that the only hearing given to the land-owner relates to the apportionment of the fixed amount among the lots assessed, and none is given as to the aggregate to be collected. No hearing would open the discretion of the legislature, or be of any avail to review or change it. A hearing is given by the act as to the apportionment among the land-owners, which furnishes to them an opportunity to raise all pertinent and available questions, and dispute their liability, or its amount and extent. The precise wrong of which complaint is made appears to be that the land-owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid. But that objection becomes a criticism upon the action of the legislature and the process by which it determined the amount to be raised and the property to be assessed. Unless by special permission, that is a hearing never granted in the process of taxation. The legislature determines expenditures and amounts to be raised for their payment, the whole discussion and all questions of prudence and propriety and justice being confided to its jurisdiction. It may err, but the courts cannot review its discretion. In this case it kept within its power when it fixed, first, the amount to be raised to discharge the improvement debt incurred by its direction; and, second, when it designated the lots and

property, which in its judgment, by reason of speci benefits, should bear the burden, and having the powe we cannot criticise the reasons or manner of its actio The land-owners were given a hearing, and so there wa no constitutional objection in that respect, Nor was tha hearing illusory. It opened to the land-owner an oppo tunity to assail the constitutional validityof the act unde which alone an apportionment could be made, and that ob jection failing, it opened the only other possible que tions, of the mode and amounts of the apportionmen itself. We think the act was constitutional." 100 N. Y 587-589.

County of Mobile vs. Kimball, 102 U. S. 691.

A law of the state of Alabama had authorized th county of Mobile to issue bonds for the improvement o the river, bay and harbor of Mobile, and it was held tha this was not a taking of private property for public use within the meaning of the constitutional clause. Th facts were so entirely different, and the principles of law in question were so far removed from those in questio here, that it would be useless to examine the case further

Stanley vs. Supervisors, 121 U. S. 535, 550.

The effect of the decision in this case, so far as i material, is sufficiently stated in the head-note, as follows

"When the statutes of a state provide a board fo the correction of errors and irregularities of assessor in the assessment of property for purposes of taxation the official action of that body is judicial in character and its judgments are not open to attack collaterally."

It will be seen that the doctrine of this case is identi cal with that of Davidson vs. New Orleans.

Laramie County vs. Albany County et al., 92 U. S 307, holds that unless the constitution of a state or the organic law of a territory otherwise prescribes, the legis lature has the power to diminish or enlarge the area of a county whenever the public necessity or convenience re quires, and nothing more.

In Fallbrook Irrigation District vs. Bradley, 164 U. S. 112, 169, the case was determined, so far as it is material to the present question, upon the ground that

the effect of the existence of the benefits had been judicially determined by the board of supervisors. It was said:

"The difference between this case and the case of Spencer vs. Merchant, 125 U. S. 345, is said by counsel for appellees to consist in the fact that in the Spencer case the lands in question might have been benefited, while here the additional benefit to land already capable of beneficial use without irrigation is in no legal or proper sense a benefit which can be considered for the purpose of an assessment. We think this alleged difference is not material. It is in each case one of degree only and the fact of the benefit is by the act to be determined after a hearing by the board of supervisors. In this case the board has necessarily decided that question in favor of the fact of benefits by retaining the lands in the district. Unless this court is prepared to review all questions of fact of this nature decided by a state tribunal, where the claim is made that the judgment was without any evidence to support it or was against the evidence, then we must be concluded by the judgment on such a question of fact, and treat the legal question as based upon the facts as found by the State board. Due process of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the State, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute."

Kelly vs. Pittsburg, 104 U. S, 78.

"In view of the finding of the board of supervisors on this question of benefits, assuming that there has been one, this court cannot say as a matter of law that the lands of the plaintiff in this case have not been or cannot be benefited by this proposed irrigation. There can be no doubt that the board of supervisors (if it have power to hear the question of benefits, as to which something will be said under another head of this discussion) would be a proper and sufficient tribunal to satisfy the constitutional requirement in such case."

Wurts vs. Hoagland, 114 U. S. 606.

The conclusion in this case is stated by Justice Gray, speaking for the court, as follows:

"As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the Fourteenth Amendment of the Constitution of the United States. Barbier vs. Connolly, 113 U. S. 27, 31; Walker vs. Sauvinet, 92 U. S. 90; Davidson vs. New Orleans, 96 U. S. 97; Hagar vs. Reclamation District, 111 U. S. 701."

R. R. Co. vs. Richmond, 96 U. S. 521, does not involve any tax or assessment of any kind, and is not in point.

It now becomes necessary to examine the case of Hagar vs. Reclamation District, 111 U. S. 701.

In this case swamp lands had been assessed for the purpose of reclamation.

The law of California provided for the appointment by the supervisors of three commissioners, "who are jointly to view and assess upon each acre to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which will result from the works."

The ojection to the assessment in this case was that it was "made without notice to the defendant or without his being afforded any opportunity to be heard respecting it, the law authorizing it containing no provision for such notice or hearing."

It had been held by the courts in California that in a suit for the collection of such assessments, the defendant might set up any grievances he had, including any unfairness or inequality in the assessment of benefits. In other words, he might prove that the reclamation did not benefit him in the amount assessed, or did not benefit him at all, or that it was an injury to him. The court therefore decided that his property could not be taken without due process of law under that proceeding.

Under the laws of Missouri, however, and the decisions of the Missouri courts, it is settled that no such defense can be made; that when suit is brought to enforce

the lien of the tax-bill upon the property assessed the defendant cannot show either that the property was not benefited to the amount assessed, or that it was not benefited at all, or that it was injured by the improvement for which it was assessed. Therefore, the precise ground upon which the case of Hagar vs. the Reclamation District was decided, does not exist in this case.

Judge Field, speaking for the court, says:

"In some States, instead of a board of revision or equalization the assessment may be revised by proceedings in the courts and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment which can be deemed essential to render the proceedings due process of law. In Davidson vs. New Orleans this court decided this precise point. In that case an assessment levied on certain real property in New Orleans for draining the swamps of that city was resisted on the ground that the proceeding deprived the owners of their property without due process of law, but the court refused to interfere, for the reason that the owners of the property had notice of the assessment and an opportunity to contest it in the courts. After stating that much misapprehension prevailed as to the meaning of the terms "due process of law," and that it would be difficult to give a definition that would be at once perspicuous and satisfactory, the court, speaking by Mr. Justice Miller, said that it would lay down the following proposition as applicable to the case." (That proposition is the one we have quoted in the case of Davidson vs. New Orleans.) "This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer and

opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. Reclamation District No. 108 vs. Evans, 61 Cal. 104. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller in the New Orleans case, these words as used in the Constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed."

The case of Lent vs. Tillson, 140 U. S. 316, although not so frequently cited as being inconsistent with the decision in the Norwood case, is a similar case, and the opinion is so full upon the question of the necessity of notice and hearing, and also upon the weight and effect to be given to the decision of the Supreme Court in construing the effect of the law, that it is deserving of notice. In the course of the opinion, speaking by Mr. Justice Harlan, the court said:

"For any person interested, and who felt himself aggrieved by the action or determination of the board, as indicated by its report, was permitted at any time within the above thirty days, to apply by petition to the county court of the city and county, showing his interest in the proceedings of the board of commissioners, and his objections thereto, for an order that would bring before that court the report of the board, together with such pertinent documents or data as were in its custody, and were used in preparing its report."

After stating the powers and duty of the board of commissioners upon such petition, the court proceeds:

"Were not these provisions in substantial conformity with the requirements of 'due process of law,' as recognized in the decisions of this court?"

The court then cites the portions of the decisions in Davidson vs. New Orleans and Hagar vs. Reclamation District, which we have already cited, and then proceeds:

"These principles were reaffirmed in Kentucky Railroad Tax Cases, 115 U. S. 321, 331, and in Spencer vs.

Merchant, 125 U. S. 345, 355, in the latter of which cases it was said that 'the legislature, in the exercise of its power of taxation, has the right to direct the whole or part of the expense of a public improvement, such as the laying, grading or repairing (and, equally, the widening) of a street, to be assessed upon the owners of lands benefited thereby;' and that 'the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion;' also, that, 'if the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.'

"Tested by these principles, the statute providing for the widening of Dupont street cannot be held to be repugnant to the constitutional requirement of due process of law. * * * * If we had any doubt of the correctness of these views, we should accept the interpretation which the highest court of the state places upon the statute. When the inquiry is whether a state enactment under which property is proposed to be taken for public purpose accords full opportunity to the owner, at some stage of the proceedings involving his property, to be heard as to their regularity or validity, we must assume that the inferior courts and tribunals of the state will give effect to such enactment as interpreted by the highest court of that state. The Supreme Court of California, speaking by Mr. Justice Temple, in this case, has said: 'We are not considering here a statute which is silent as to the hearing. The provisions in question were undoubtedly inserted in view of the constitutional requirement, and for the purpose of affording that opportunity to be heard, *without which the law would be void.* To give the statute the construction contended for would not only defeat the evident purpose, but would make the whole proceeding farcical. And, I must confess, it seems to me it requires great industry in going wrong, in view of all the circumstances, to conclude that such can be the meaning. Inapt words certainly are found in the section, but it would not have provided so elaborately for a thorough investigation for grievances if it were not intended that redress should be awarded. * * * * It is said that the county court was without power to adjudge the stat-

ute to be unconstitutional, and had no discretion, except to confirm the report, or to require it to be altered or modified. We do not perceive that this is a material inquiry, so long as the statute is not repugnant to the constitution. But we do not admit that the county court was without power to hold it to be unconstitutional and void—if such was its view—and to decline, upon that ground alone, to confirm any report that the board of commissioners might have filed. The judge or judges of that court were obliged, by their oath of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the constitution of the state to the contrary notwithstanding. Upon this subject, as well as in respect to the power of the county court to consider objections of every nature that might be made to the confirmation of any report from the board of county commissioners, the Supreme Court of the state said: 'The statute does not expressly authorize the court to pass upon the validity of the act, or whether the board of supervisors had passed the necessary resolution, or the notices had been given. But the power to do this is necessarily involved in the power of the court to act at all. It may be that the court could not pass upon these questions upon which its jurisdiction depended, so as to conclude all inquiry even on a collateral attack. It was a constitutional court, invested with jurisdiction by the constitution of special cases. The parties had full notice of the proceeding, and of their right to be heard. Again: 'The statute places no limit upon the objections which might be made by those deeming themselves aggrieved by the action or determination of the board as shown in the report. As all their determinations which could affect any person were required to appear in the report, this would seem to include all possible objections.' * * * * * They could have explained that a wrong basis was adopted in estimating damages or benefits; that the estimated cost was too much, or for any misconduct of the commissioners which could effect them, or that the cost exceeded the estimated benefits, and it does not seem to me that the court would have found any difficulty in granting relief.' 72 California, 404, 422."

As to the binding effect of the results of a hearing upon notice, and of the necessity of such hearing to make valid proceedings in similar cases, this decision is a very important one, as it is upon the further question as to the effect of a decision of the state court construing the statute and declaring whether or not such hearing is allowed under the law. In the case cited, the Supreme Court of California had decided that such a hearing could be had. In the present case, the Supreme Court of Missouri has authoritatively decided that there can be no hearing, and that no hearing is necessary. In fact, the law requiring the entire cost of the improvement to be levied upon the property fronting it, according to the front feet, forbids any hearing on the question as to the proper distribution of the assessment.

N. Y. & G. L. R. R. Co. vs. Kenney, 55 N. J. L. 463.
People vs. Jefferson County Court, 55 N. Y. 604 607.
Lee vs. Ruggles, 62 Ills. 427 at 431.
Creote vs. Chicago, 56 Ills. 422.
St. John vs. City, 50 Ills. 92-3-4-5-6.
Vreeland vs. Jersey City, 43 N. J. L. 155.

The Supreme Court of Missouri, on page 40 of printed record, in commenting on the case of Norwood vs. Baker, 172 U. S. 269, say:

"In the condemnation proceeding proper the jury assessed her compensation at $2,000, and that sum was paid her, and thereupon the village council assessed her with the $2,000 and all costs of the condemnation, amounting to $218.58 as benefits to her abutting property. The result being that the village acquired her land for nothing and charged her $218.58 for having deprived her of it." This is an error. She was paid for the land and now they propose to take $2,000 from her and charge her $218.58 for doing it and sell her land to pay the charge whether benefited or not. If Mrs. Baker's land was benefited $3,000, then it is a mistake to say "the village acquired her land for nothing and charged her $218.58 for having deprived her of it."

If the condemned land had belonged to another and in its condemnation the value had been assessed at $2,000.00

the case would not be different. The village of Norwood had paid $2,000 for land for the street and $218.58 for costs. It must raise this by a tax—both the costs, $218.58, and the principal sum of $2,000. If Mrs. Baker's abutting land, not benefited, is sold to pay for this street, what does she get, if she gets no benefit?

It is said that the case of Spencer vs. Merchant, 125 U. S. 345, is against the contention of the plaintiffs in error in this case. I cannot so understand the decision of the Supreme Court of New York on the majority opinion of this court, or even the minority opinion. Let me recount some of the salient facts in that case. Under the acts of the legislature of New York a street in the town of New Lots is opened. The owners of the land taken, and also owners of lands to be benefited, were parties to this suit in court, damages and benefits were assessed and paid. Then, under the 4th section of the Act of 1869, amended in 1870, the court appointed commissioners to assess the benefits for grading and paving the street. The commissioners were appointed, assessed the benefits and reported to the court and the court approved the report. The act did not require any notice, nor was any given to property owners. The total cost was $100,000, and after a large part had been paid the Court of Appeals held the assessment void, as reported in Stewart vs. Palmer, 74 N. Y.

The state of New York had paid for this whole work, and in 1881 an act was passed by her legislature to assess the remainder of cost and interest on the remaining lots, which had paid nothing.

In Spencer vs. Merchant, 125 U. S. at 352-3-4-5 is copied the opinion of the Court of Appeals of New York (100 N. Y. 587-8-9).

After reciting all that had been done the Supreme Court of New York say:

"We are not at liberty to say that the tax on the property covered by the law of 1881 was imposed without reference to special benefits." (Page 353, bottom half of page.)

The legislature is said to determine the lands benefited and the amount of benefit, but in that case it was not final on the property.

The Board of Supervision of King's county were to put upon the assessment roll of the Town of New Lots

"A sum equitably apportioned among the several parcels, etc., etc., equal to $55,653.52." Notice was to be given.

"And all parties interested in said lands shall be entitled to be heard before said board upon the question of said apportionment." A construction was put on the language of the statute of 1881. What is meant by "a sum equitably apportioned?" It is sometimes stated that this whole sum must be taxed on these lots whether benefited or not. It is said that the legislature had determined by the Act of 1881 that these lots were benefited to the amount of $55,653.52. If the legislature by the Act of 1881 made this determination and had authority to do so, then the courts can not interfere. Say the Supreme Court of New York, quoted in 125 U. S. at 354:

"A hearing is given by the Act as to the apportionment among the land-owners, which *furnishes to them an opportunity to raise all pertinent and available questions and dispute their liability, or its amount and extent.*"

Here is a tribunal before which the property owner is notified to appear, and before which under that statute, as construed by the Supreme Court of New York, he may appear and dispute his liability and its extent and raise all pertinent and available questions. By his failure to appear before this tribunal, after notice and opportunity to be heard, there is a judgment, or its equivalent, that his property is benefited to the extent or in the sum apportioned by this board of supervisors. He is bound by that judgment (obtained on notice and opportunity to be heard) to the same extent as he is bound by any other judgment of any other judicial tribunal having jurisdiction of the person and subject matter.

Says the court, page 354:

"The precise wrong of which complaint is made appears to be that the land owners now assessed never had opportunity to be heard as to the original apportionment, and find themselves now practically bound by it as between their lots and those of the owners who paid."

"But this is a mere criticism of the Act of the l
lature."

"The land owners are given a hearing, and so t
was no constitutional objection in that respect. *No*
that hearing illusory. It opened to the land owner an op
tunity to assail the constitutional validity of the act u
which alone an apportionment could be made, and tha
jection failing, it opened the only other possible q
tions, of the mode and the amounts of the apportion
itself. 100 N. Y. 587-9, quoted in Spencer vs. Merch
125 U. S. 345 at 352-3-4-5. By certiorari, the prop
holder could have taken the case to the Supreme Cou
New York, thence to New York Court of Appeals, th
to this court, as was done in New York State vs. P
erts, 171 U. S. 658. The legislature has the righ
place the whole charge on the abutting property (to
extent, and only to the extent of the benefits) even if
State receive a benefit twice as much. It may be a g
injustice to local property owners for the State at l
to receive a very large benefit and yet compel local p
erty to pay the charges, but the legislature has that
cretion.

"No hearing would open the discretion of the legi
ture, or be of any avail to review or change it." No
ference how much the general public were benefited
the other lot owners who paid, if one lot owner was
benefited he need not pay. He can "dispute" his liabil
and may be successful in such "dispute."

The board of supervisors had jurisdiction to de
mine whether this Act of 1881 was repugnant to the C
stitution of the United States. Suppose the prope
owner made that defense and was defeated, could he
tack the judgment collaterally?

These plaintiffs in error made the defense in
Jackson Circuit Court that the Kansas City charter
repugnant to the Constitution of the United Stat
We were defeated. Were we at liberty to disregard t
judgment? Were we at liberty to litigate a new, col
erally, all the questions we might have set up, and
set up, in that case, and on which we were defeated?

Under the Act of 1881 the board of supervisors
Kings county had judicial powers.

Any land-owner (says the highest court of the state of New York, passing judgment on this New York statute) may appear and dispute his liability. And this hearing is not illusory. He may then be successful in his dispute of his liability or the amount. If one may be successful, all may be successful.

It is one thing for the legislature to prescribe it as *a general rule* that property abutting on a street opened shall be deemed benefited; it is quite a different matter for the legislature of New York to prescribe by its legislative enactment that Mr. Spencer's property (in Spencer vs. Merchant) was benefited to the amount of $1,221.73. It is one thing for the legislature of Kansas City to determine, *if it had authority*, that in general property on Forest avenue is benefited by the paving; it is quite a different thing to determine that Mrs. French's property is benefited $302.54. It is always competent for the legislature to fix the "benefit district."

In Bauman vs. Ross, 167 U. S. 548 at 564, where it appears that the contention was that the Act of Congress was void because it failed to fix the limits of the benefit district.

Bauman vs. Ross, 167 U. S. Loc. Cit. 591.

"It was argued that Section 15 was too uncertain to be put into execution, because it failed to define the district or territory within which the benefits might be assessed, and did not even specify whether the assessment should or should not be confined to lands within the particular sub-division in which a new highway was established. But in either alternative the assessment could not include lands outside of the District of Columbia; and the section would be equally constitutional whether the district of assessment was the particular sub-division, or the whole district of Columbia."

Bauman vs. Ross, 167 U. S. 590.

"If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings,

upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law. Davidson vs. New Orleans; Spencer vs. Merchant; Walston vs. Nevin; Lent vs. Tillson; Paulsen vs. Portland; Fallbrook Irrig. Dist. vs. Bradley, above cited.',

The New York Statute gave that hearing.

Parsons vs. District of Columbia, 170 U. S. 45, is cited as being in opposition to Norwood vs. Baker. That was a general tax. This appears from the statutes referred to, or it may be called a special tax.

But there is a difference between a special tax and a local tax or assessment. This is shown in Farrar vs. St. Louis, 80 Mo. 379 at 386-7-8-9 and 390-1.

The Kansas City charter confers on the mayor and common council a bare authority. The power to determine whether there are benefits, and how much, is not given, and is therefore withheld. The authority was to pave Forest avenue and charge the entire cost on the abutting property, knowing it was no benefit.

This must have been the case in Zoeller vs. Kellogg, 4 Mo. Appeals 163, for there the land, with all additions by way of improvement or enhancement of value, was worth $1,025, and tax-bills were $1,645. Precisely the same thing may happen under the Kansas City charter. Taxation must exist by statute. The general common law cannot help it out. The assessment or tax-bill sued on is void because it is founded on a rule which excludes any consideration of benefits. To the extent of the excess of the cost of the work over and above any special peculiar exceptive benefits, it is taking private property for public use without just compensation. The legislative enactment that accomplishes this result may be, and doubtless is, the process of the mob, but it is not "Due Process of Law."

The legislative power cannot fix or determine the "just compensation" to which the owner of property taken for public use is entitled.

Monongehala Navigation Company vs. United States, 148 U. S. 312.

County Court of St. Louis County vs. Griswold, 58 Mo. 175 at 199—top.

If "these exceptive benefits" constitute part or all of the "just compensation" required by the constitution; how can the legislature of Missouri, or the common council of Kansas City (even if duly authorized, which we do not admit) determine the one any more than the other?

I have received valuable assistance in making this brief from Mr. John C. Gage, Judge F. M. Black and Judge Richard H. Field and from other lawyers.

I respectfully ask a reversal of the judgment; and that this court enter judgment for plaintiffs in error, or remand the cause to the Supreme Court of Missouri with directions to reverse the judgment of the Jackson Circuit Court and remand the case to that court with directions to enter judgment for plaintiffs in error.

All of which is most respectfully submitted.

HENRY N. ESS.

Counsel for Plaintiffs in Error.

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No. 498.

DEC 21 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH ET AL., PLAINTIFFS IN ERROR,

vs.

BARBER ASPHALT PAVING CO., DEFENDANT IN ERROR.

RESOLUTION OF CITY COUNCIL OF ST. LOUIS, FILED IN SUPPORT OF MOTION TO ADVANCE.

WILLIAM C. SCARRITT,
Counsel for Defendant in Error.

EDWARD L. SCARRITT,
Of Counsel.

(17,983.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 12-22-1900

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 498.

MARGARET FRENCH ET AL., PLAINTIFFS IN ERROR,

vs.

BARBER ASPHALT PAVING CO., DEFENDANT IN ERROR.

Resolution of City Council of St. Louis Filed in Support of Motion to Advance.

Whereas a large amount of public improvements in the nature of street improvements and sewers must be executed by the city of St. Louis preparatory to welcoming the visitors to the World's fair to be held here; and

Whereas grave doubts have arisen as to the validity of

certain of the charter provisions and ordinances of this city under which for many years the city has been accustomed to contract and pay for such works by assessments levied in the manner commonly known as that according to the front-foot or area rule; and

Whereas the welfare and progress of this city and the exigencies of the time demand that the question of the validity of these laws be settled as speedily as possible: and

Whereas there is now pending before the Supreme Court of the United States the case of French *et al. vs.* Paving Company, on writ of error to the supreme court of Missouri, involving the validity of a similar law:

Be it resolved by the council of St. Louis, That the Honorable the Chief Justice and the Justices of the Supreme Court of the United States be, and they are hereby, respectfully, but earnestly, petitioned to advance the said case of French *et al. vs.* Paving Company and hear the same at a date as early as the convenience of the court will permit, to the end that the people and controlling authorities of this city may have the guidance of that honorable court in the framing and in the execution of the laws in respect to the matters hereinbefore recited.

STATE OF MISSOURI, }
City of St. Louis, } ss:

I, Charles R. Graves, secretary of the city council of St. Louis, do certify that the foregoing is a true copy of the original resolution adopted and passed by the said city council of St. Louis on December 18, 1900.

In witness whereof I have hereunto set my hand this 18th day of December, 1900.

CHAS. R. GRAVES,
Secretary City Council.

[Endorsed:] File No., 17,983. Supreme Court U. S., October term, 1900. Term No., 498. Margaret French *et al.*, P. E., *vs.* The Barber Asphalt Paving Co. Resolution of city council of St. Louis. Filed Dec. 21, 1900.